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III. Particular Types of Waters or Water Bodies

C. Navigable Waters

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Research References

West's Key Number Digest

West's Key Number Digest, Water Law 2515 to 2538, 2541, 2557, 2558, 2580 to 2585, 2588, 2589, 2592, 2600, 2603, 2607, 2613, 2618, 2625, 2626, 2629 to 2633, 2536 to 2552, 2601 to 2610, 2629 to 2632, 2647 to 2650

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A.L.R. Index, Waters and Watercourses
West's A.L.R. Digest, Water Law 2515 to 2538, 2541, 2557, 2558, 2580 to 2585, 2588, 2589, 2592, 2600, 2603, 2607, 2613, 2618, 2625, 2626, 2629 to 2633, 2536 to 2552, 2601 to 2610, 2629 to 2632, 2647 to 2650

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III. Particular Types of Waters or Water Bodies

C. Navigable Waters

1. In General

§ 135. Definition

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2515, 2528

"Navigable waters" are defined as waters that are capable of being navigated—that is, navigable in fact.[1] The test for navigability applies to all watercourses.[2]

Waters are not regarded as navigable merely because they are affected by the tides.[3]

Footnotes

1 Utah v. U.S., 403 U.S. 9, 91 S. Ct. 1775, 29 L. Ed. 2d 279 (1971); Mullenix v. U.S., 984 F.2d 101 (4th Cir. 1993); Blackman v. Mauldin, 164 Ala. 337, 51 So. 23 (1909); Mashburn v. St. Joe Improvement Co., 19 Idaho 30, 113 P. 92 (1910); Schulte v. Warren, 218 Ill. 108, 75 N.E. 783 (1905); State v. Akers, 92 Kan. 169, 140 P. 637 (1914), aff'd, 245 U.S. 154, 38 S. Ct. 55, 62 L. Ed. 214 (1917); D'Albora v. Garcia, 144 So. 2d 911 (La. Ct. App. 4th Cir. 1962); Smart v. Aroostook Lumber Co., 103 Me. 37, 68 A. 527 (1907); State v. Adams, 251 Minn. 521, 89 N.W.2d 661 (1957); Bollinger v. American Asphalt Roof Corp., 224 Mo. App. 98, 19 S.W.2d 544 (1929); Adirondack League Club, Inc. v. Sierra Club, 92 N.Y.2d 591, 684 N.Y.S.2d 168, 706 N.E.2d 1192 (1998); Gwathmey v. State Through Dept. of Environment, Health, and Natural Resources Through Cobey, 342 N.C. 287, 464 S.E.2d 674 (1995); State v. Cleveland & P. R. Co., 94 Ohio St. 61, 113 N.E. 677 (1916); State v. West Tennessee Land Co., 127 Tenn. 575, 158 S.W. 746 (1913); Boutwell v. Champlain Realty Co., 89 Vt. 80, 94 A. 108 (1915); Bernot v. Morrison, 81 Wash. 538, 143 P. 104 (1914), dismissed, 250 U.S. 648, 39 S. Ct. 492, 63 L. Ed. 1188 (1919).

2 Wehby v. Turpin, 710 So. 2d 1243 (Ala. 1998).

3 Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 P. 532 (1907); Clement v. Watson, 63 Fla. 109, 58 So. 25 (1912).

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C. Navigable Waters

1. In General

§ 136. As public waters

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2515

The division of waters into navigable and nonnavigable is another way of classifying them as public or private,[1] and navigable waters embrace all bodies of water that are public in their nature.[2] A naturally navigable watercourse does not lose its character as a public watercourse because part of its channel has been artificially created.[3] The fact that the bottoms or beds of navigable bodies of water are susceptible to private ownership does not affect the question of navigability.[4]

Footnotes

1 State v. Korrer, 127 Minn. 60, 148 N.W. 1095 (1914); Downes v. Crosby Chemicals, Inc., 234 So. 2d 916 (Miss. 1970); Mentor Harbor Yachting Club v. Mentor Lagoons, Inc., 170 Ohio St. 193, 10 Ohio Op. 2d 131, 163 N.E.2d 373 (1959).
The State of Florida's failure to reserve public rights of access to a creek in deeds surrounding the creek was probative of whether the State considered the creek to be "navigable" at the time the property was conveyed even though, under Florida law, failure to reserve public rights did not divest the State of title. Lykes Bros., Inc. v. U.S. Army Corps of Engineers, 64 F.3d 630 (11th Cir. 1995).

2 State v. Korrer, 127 Minn. 60, 148 N.W. 1095 (1914).
Determining the navigability of a stream is essentially a matter of deciding if it is public or private property. Nichols v. Culotches Bay Navigation Rights Committee, L.L.C., 2009 Ark. App. 365, 309 S.W.3d 218 (2009).

3 Mentor Harbor Yachting Club v. Mentor Lagoons, Inc., 170 Ohio St. 193, 10 Ohio Op. 2d 131, 163 N.E.2d 373 (1959).

4 D'Albora v. Garcia, 144 So. 2d 911 (La. Ct. App. 4th Cir. 1962).

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C. Navigable Waters

1. In General

§ 137. Law governing

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West's Key Number Digest

West's Key Number Digest, Water Law 2521

The question of navigability of a waterway within a state, when asserted as a basis of a right arising under the Constitution of the United States, is necessarily a question of federal law.[1] It is not for a state, by its courts or legislature, in dealing with the general subject of beds or streams, to adopt a retroactive rule for determining navigability that would enlarge what actually passed to the state, at the time of admission, under the equal footing doctrine.[2] However, what shall be deemed a navigable water within the meaning of the local rules of property in the bed of a stream is a matter of state law.[3] The states retain the residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal footing doctrine.[4]

A decision of a state court that a particular river within the state is navigable is not binding on the United States government if it is not a party to the suit in which the decision is made.[5]

Footnotes

1 U.S. v. Holt State Bank, 270 U.S. 49, 46 S. Ct. 197, 70 L. Ed. 465 (1926).

2 PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012).
As to ownership of navigable waters under the equal footing doctrine, see § 147.

3 Donnelly v. U.S., 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913).

4 PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012).
As to the public trust doctrine, see § 162.

5 Brewer-Elliott Oil & Gas Co. v. U.S., 260 U.S. 77, 43 S. Ct. 60, 67 L. Ed. 140 (1922); State of Oklahoma v. State of Texas, 258 U.S. 574, 42 S. Ct. 406, 66 L. Ed. 771 (1922).

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C. Navigable Waters

1. In General

§ 138. What constitutes navigability

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2517, 2520

Law Reviews and Other Periodicals

Kalo, "It's navigable in fact so I can fish in it": the public right to use manmade, navigable-in-fact waters of Coastal North Carolina, 89 N.C. L. Rev. 2095 (September 2011)

Navigability, in the sense of actual usability for navigation, or navigability in fact, as a legal concept embracing both public and private interests, is not susceptible of definition or determination by a precise formula that fits every type of stream or body of water under all circumstances and at all times.[1] A body of water deemed navigable in fact is also deemed navigable in law,[2] and, conversely, a waterway may be found to be navigable in fact even if it is not mentioned in a statute as being navigable at law.[3]

A general definition or test that has been formulated for federal purposes is that rivers or other bodies of water are navigable when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of water transportation.[4] Present navigability is the standard for determining what is a navigable waterway for purposes of admiralty jurisdiction.[5] However, for purposes of ownership under the equal footing doctrine,[6] navigability is determined as of when a state was admitted to the Union, and thus river segments are navigable not only if they were used but also if they were susceptible of being used as highways of commerce at the time of obtaining statehood.[7]

Navigability in any sense other than the federal definition described above may mean any one of a variety of definitions given navigation by any of the states.[8]

Footnotes

1 U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940); D'Albora v. Garcia, 144 So. 2d 911 (La. Ct. App. 4th Cir. 1962).

2 PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012); Newcomb v. County of Carteret, 207 N.C. App. 527, 701 S.E.2d 325 (2010), review denied, 365 N.C. 212, 710 S.E.2d 26 (2011).

3 Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC, 205 Cal. App. 4th 999, 141 Cal. Rptr. 3d 109 (5th Dist. 2012), as modified on denial of reh'g, (May 30, 2012) and review denied, (July 18, 2012).
As to statutory declarations of navigability, see § 145.

4 PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012); Utah v. U.S., 403 U.S. 9, 91 S. Ct. 1775, 29 L. Ed. 2d 279 (1971); Mullenix v. U.S., 984 F.2d 101 (4th Cir. 1993); Dardar v. Lafourche Realty Co., Inc., 55 F.3d 1082 (5th Cir. 1995); Lykes Bros., Inc. v. U.S. Army Corps of Engineers, 64 F.3d 630 (11th Cir. 1995).

5 Three Buoys Houseboat Vacations U.S.A. Ltd. v. Morts, 921 F.2d 775 (8th Cir. 1990).

6 § 147.

7 PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012) (further holding that a state may not adopt a retroactive rule for determining navigability that would enlarge what actually passed to the state).
As to capacity to be used as a navigable water, see § 139.

8 Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).
Navigability, which is a question of fact, depends on the usefulness of the waterway to the public. Nichols v. Culotches Bay Navigation Rights Committee, LLC, 2011 Ark. App. 730, 387 S.W.3d 199 (2011).
Originally, navigability was defined as a stream susceptible to the useful commercial purpose of carrying the products of the country, but this is no longer the test in California. People ex rel. Baker v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (3d Dist. 1971).

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C. Navigable Waters

1. In General

§ 139. What constitutes navigability—Capacity for and character of use

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2522, 2523

The question of navigability generally depends on whether the stream or body of water in its natural state is such that it affords a channel or highway for useful commerce and travel.[1] According to this test, if the stream or body of water is capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and therefore becomes a public river or highway.[2] If a body of water has sufficient capacity to be legally navigable, this determines its status, regardless of whether it is being actually used as a highway.[3] Thus, the determination also involves whether the body of water is susceptible or capable of bearing commercial navigation.[4]

The capacity of a body of water for recreational use is to be considered but, standing alone, is not necessarily determinative of navigability.[5] Evidence of recreational use of a river, depending on its nature, may bear on the river's susceptibility to commercial use.[6] Navigability may elsewhere be defined broadly to include any legitimate and beneficial use, whether commercial or recreational; under this view, commercial use of the waterway is not required for it to be navigable, and pleasure traffic is entitled to protection in using the waterway.[7]

Once a waterway has been deemed navigable, it remains so; it retains its navigable status, even though it is not presently used for navigation, or is presently incapable of use because of changed conditions or the presence of obstructions.[8] Neither a lengthy absence of use caused by changed conditions nor the advent of modern means of transportation affects the navigability of rivers.[9]

Footnotes

1 U.S. v. State of Utah, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931).
A water's navigability depends on its public commercial usefulness. Nichols v. Culotches Bay Navigation Rights Committee, LLC, 2011 Ark. App. 730, 387 S.W.3d 199 (2011).
A watercourse is navigable when, by its depth, width, and location, it is rendered available for commerce. Dunaway v. Louisiana Wildlife and Fisheries Com'n, 6 So. 3d 228 (La. Ct. App. 1st Cir. 2009).
A creek and artificial lake created by a dam were not "navigable waterways" even though the creek flowed through lands belonging to more than one person and was occasionally used by fishing boats and canoes during some parts of year; proof of occasional use by boats and canoes did not show that the creek was capable of any beneficial public use. Wehby v. Turpin, 710 So. 2d 1243 (Ala. 1998).

2 U.S. v. State of Utah, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931); U.S. v. Holt State Bank, 270 U.S. 49, 46 S. Ct. 197, 70 L. Ed. 465 (1926).

3 Utah v. U.S., 403 U.S. 9, 91 S. Ct. 1775, 29 L. Ed. 2d 279 (1971); U.S. v. State of Utah, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931); Economy Light & Power Co. v. U.S., 256 U.S. 113, 41 S. Ct. 409, 65 L. Ed. 847 (1921); Mullenix v. U.S., 984 F.2d 101 (4th Cir. 1993); Lykes Bros., Inc. v. U.S. Army Corps of Engineers, 64 F.3d 630 (11th Cir. 1995); Ricko Const., Inc. v. Dubois, 57 So. 3d 564 (La. Ct. App. 3d Cir. 2011) (lack of commercial traffic does not preclude a finding of navigability); Gwathmey v. State Through Dept. of Environment, Health, and Natural Resources Through Cobey, 342 N.C. 287, 464 S.E.2d 674 (1995); State v. West Tennessee Land Co., 127 Tenn. 575, 158 S.W. 746 (1913).
Evidence of a river's practical utility for transportation and thus its navigability in fact need not be limited to evidence of its capacity for the movement of commercial goods or commodities. Adirondack League Club, Inc. v. Sierra Club, 92 N.Y.2d 591, 684 N.Y.S.2d 168, 706 N.E.2d 1192 (1998).

4 PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012); State ex rel. Winkleman v. Arizona Navigable Stream Adjudication Com'n, 224 Ariz. 230, 229 P.3d 242 (Ct. App. Div. 1 2010); Briggs v. Jupiter Hills Lighthouse Marina, 9 So. 3d 29 (Fla. 4th DCA 2009); Dunaway v. Louisiana Wildlife and Fisheries Com'n, 6 So. 3d 228 (La. Ct. App. 1st Cir. 2009); Brownlee v. South Carolina Dept. of Health and Environmental Control, 382 S.C. 129, 676 S.E.2d 116 (2009); Hix v. Robertson, 211 S.W.3d 423 (Tex. App. Waco 2006).

5 Portage Cty. Bd. of Commrs. v. Akron, 109 Ohio St. 3d 106, 2006-Ohio-954, 846 N.E.2d 478 (2006).
Recreational use is part of the navigability analysis and can be considered in determining whether a river is navigable in fact. Adirondack League Club, Inc. v. Sierra Club, 92 N.Y.2d 591, 684 N.Y.S.2d 168, 706 N.E.2d 1192 (1998).

6 PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012).

7 Brownlee v. South Carolina Dept. of Health and Environmental Control, 382 S.C. 129, 676 S.E.2d 116 (2009).

8 Lykes Bros., Inc. v. U.S. Army Corps of Engineers, 64 F.3d 630 (11th Cir. 1995).

9 Muckleshoot Indian Tribe v. F.E.R.C., 993 F.2d 1428 (9th Cir. 1993).

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C. Navigable Waters

1. In General

§ 140. What constitutes navigability—Partial or limited navigability; effect of obstructions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2526

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Portage Necessity as Affecting Navigability of Waterway Under Nonenvironmental Federal Law, 3 A.L.R. Fed. 2d 375

It is not necessary that waters be navigable in all their parts for the public to have a right of navigation where there is sufficient depth and fitness for such use.[1] The navigability of a stream may be only of a substantial part of it.[2] Navigability in the sense of the law is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages.[3] A river is navigable in fact although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sandbars, if the river actually affords a channel for useful commerce or a useful purpose.[4] Artificial impediments, such as a dock that made access at the mouth of a tributary where it joined a river more difficult, do not affect the navigable nature of the tributary where these impediments did not cause the waterway to lose its characterization as navigable.[5]

Footnotes

1 U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940); U.S. v. State of Utah, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931); Schulte v. Warren, 218 Ill. 108, 75 N.E. 783 (1905).

2 U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940).

3 Economy Light & Power Co. v. U.S., 256 U.S. 113, 41 S. Ct. 409, 65 L. Ed. 847 (1921); Lykes Bros., Inc. v. U.S. Army Corps of Engineers, 64 F.3d 630 (11th Cir. 1995); Adirondack League Club, Inc. v. Sierra Club, 92 N.Y.2d 591, 684 N.Y.S.2d 168, 706 N.E.2d 1192 (1998); Mentor Harbor Yachting Club v. Mentor Lagoons, Inc., 170 Ohio St. 193, 10 Ohio Op. 2d 131, 163 N.E.2d 373 (1959).

4 U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940); Mentor Harbor Yachting Club v. Mentor Lagoons, Inc., 170 Ohio St. 193, 10 Ohio Op. 2d 131, 163 N.E.2d 373 (1959).

5 Brownlee v. South Carolina Dept. of Health and Environmental Control, 382 S.C. 129, 676 S.E.2d 116 (2009).

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III. Particular Types of Waters or Water Bodies

C. Navigable Waters

1. In General

§ 141. What constitutes navigability—Times of navigability; intermittent or periodic navigability

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2525

A body of water does not need to be navigable at all times to be a navigable waterway.[1] For a stream or body of water to be navigable in the legal sense, it is sufficient that, in its natural state and with its ordinary volume of water, either constantly or at regularly recurring seasons, it has such capacity that it is valuable to the public.[2] The period or duration of navigable capacity may be a factor of importance in determining the legal status of a stream as navigable or otherwise.[3] A stream is navigable in law if it is capable of being traversed for valuable floatage for a considerable part of the year.[4] The fact that in the dry season a stream is not capable of use,[5] or that in times of drought, navigation is difficult, and sandbars and vegetation at times interfere with navigation,[6] does not necessarily detract from the character of a stream as navigable. However, the period of navigable capacity must be sufficiently regular and continued to make the stream of commercial importance or of significant value to the public.[7] On the other hand, the fact that a waterway is on occasion susceptible to navigability during brief periods of flood or high water does not mean that the waterway is navigable in fact.[8]

Footnotes

1 U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940); Dunaway v. Louisiana Wildlife and Fisheries Com'n, 6 So. 3d 228 (La. Ct. App. 1st Cir. 2009).
Access at all times is not required for the waters to be navigable. Brownlee v. South Carolina Dept. of Health and Environmental Control, 382 S.C. 129, 676 S.E.2d 116 (2009).

2 U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940); Economy Light & Power Co. v. U.S., 256 U.S. 113, 41 S. Ct. 409, 65 L. Ed. 847 (1921); Idaho Northern R. Co. v. Post Falls Lumber & Mfg. Co., 20 Idaho 695, 119 P. 1098 (1911); D'Albora v. Garcia, 144 So. 2d 911 (La. Ct. App. 4th Cir. 1962); Kamm v. Normand, 50 Or. 9, 91 P. 448 (1907); Miller v. State, 124 Tenn. 293, 137 S.W. 760 (1911); Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 P. 813 (1904); Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914).

The test of navigability is not whether a waterway is accessible at all times but whether it is accessible at the ordinary stage of the water. Jones v. SC Dept. of Health and Environmental Control, 384 S.C. 295, 682 S.E.2d 282 (Ct. App. 2009).

The test of navigability does not depend on whether the body of water is always navigable, or whether its navigability is due to natural conditions, but whether navigability is regularly recurring or of a sufficient duration to make it conducive to recreational uses. FAS, LLC v. Town of Bass Lake, 2007 WI 73, 301 Wis. 2d 321, 733 N.W.2d 287 (2007).

3 U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940).

4 Wehby v. Turpin, 710 So. 2d 1243 (Ala. 1998).

5 Rapanos v. U.S., 547 U.S. 715, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006) (for purposes of the Clean Water Act; extraordinary circumstances, such as drought); Hot Springs Lumber & Mfg. Co. v. Revercomb, 106 Va. 176, 55 S.E. 580 (1906).

6 U.S. v. Holt State Bank, 270 U.S. 49, 46 S. Ct. 197, 70 L. Ed. 465 (1926).

7 State of Oklahoma v. State of Texas, 258 U.S. 574, 42 S. Ct. 406, 66 L. Ed. 771 (1922).

8 U.S. v. Harrell, 926 F.2d 1036 (11th Cir. 1991); Wehby v. Turpin, 710 So. 2d 1243 (Ala. 1998).

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III. Particular Types of Waters or Water Bodies

C. Navigable Waters

1. In General

§ 142. Status of particular waters or classes of waters

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West's Key Number Digest

West's Key Number Digest, Water Law 2529

A.L.R. Library

What are "navigable waters" subject to Federal Water Pollution Control Act (33 U.S.C.A. ss 1251 et seq.), 160 A.L.R. Fed. 585

Law Reviews and Other Periodicals

Harris, "Pigs will fly": protecting the Los Angeles River by declaring navigability, 39 B.C. Envtl. Aff. L. Rev. 185 (Spring 2012)

In many instances, the courts have decided that certain named waters were either navigable[1] or nonnavigable.[2]

While the determination whether a water is a navigable water of the United States depends on whether interstate or foreign commerce may be conducted on it,[3] a river may be navigable, even if it is not being used for interstate commerce, if natural or artificial obstructions are not present prohibiting future use of the river for commerce, and the river flows into the ocean.[4]

Navigability of parts of a stream is clearly established where the evidence shows that on one part of the stream, keelboats were used for more than a decade, and timber and lumber were boated or rafted in large quantities for many years; and that on another part, keelboats and a small steamboat, carrying iron ore and pig iron as well as merchandise, operated for a period of at least three years.[5] Evidence supported a finding that a bay was navigable, and thus was subject to public use, where several witnesses testified that they had fished on the bay for years, used boats in the bay, and went duck hunting on the bay.[6] On the other hand, a stream cannot be said to be navigable in fact for purposes of subjecting a lake created by damming that stream to the public trust doctrine in the absence of evidence tending to show that the stream in question is passable by watercraft over an extended distance both upstream of, under the surface of, and downstream from the lake.[7]

Footnotes

1 PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012) (Missouri and Madison Rivers in Montana, based on the equal footing doctrine); Dye v. U.S., 210 F.2d 123 (6th Cir. 1954) (Ohio River); State ex rel. Winkleman v. Arizona Navigable Stream Adjudication Com'n, 224 Ariz. 230, 229 P.3d 242 (Ct. App. Div. 1 2010) (Little Salt River; discussion of best evidence of its natural condition at the time of statehood); Trahan v. Teleflex, Inc., 922 So. 2d 718 (La. Ct. App. 3d Cir. 2006), writ denied, 927 So. 2d 320 (La. 2006) (bayou, for purposes of applicability of maritime law in product liability case); Gaither v. Albemarle Hospital, 235 N.C. 431, 70 S.E.2d 680 (1952) (Pasquotank River); Hogue v. Bourgois, 71 N.W.2d 47, 54 A.L.R.2d 633 (N.D. 1955) (Missouri River, in North Dakota); Anderson v. Columbia Contract Co., 94 Or. 171, 185 P. 231 (1919) (Columbia River); Severance v. Patterson, 370 S.W.3d 705 (Tex. 2012) (bays, inlets, and other waters along the Gulf Coast that are subject to the ebb and flow of the tide of the Gulf of Mexico); State v. Cain, 126 Vt. 463, 236 A.2d 501 (1967) (Lake Champlain).
The Mississippi River and its navigable tributaries, which include the Kansas and the Arkansas Rivers in Kansas, were, by the declaration of the United States in the several acts of Congress relating to the survey and disposal of the public lands, and by other legislation relating to the western country out of which the Kansas Territory was carved, constituted public highways and recognized as navigable streams. State v. Akers, 92 Kan. 169, 140 P. 637 (1914), aff'd, 245 U.S. 154, 38 S. Ct. 55, 62 L. Ed. 214 (1917).

2 State of Oklahoma v. State of Texas, 258 U.S. 574, 42 S. Ct. 406, 66 L. Ed. 771 (1922) (Red River within Oklahoma).

3 § 168.

4 Briggs v. Jupiter Hills Lighthouse Marina, 9 So. 3d 29 (Fla. 4th DCA 2009) (thus making the maritime statute of limitations, discussed in Am. Jur. 2d, Shipping § 38, applicable).

5 U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940).

6 Nichols v. Culotches Bay Navigation Rights Committee, LLC, 2011 Ark. App. 730, 387 S.W.3d 199 (2011).

7 Bauman v. Woodlake Partners, LLC, 199 N.C. App. 441, 681 S.E.2d 819 (2009).
As to the public trust doctrine, see § 161.

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III. Particular Types of Waters or Water Bodies

C. Navigable Waters

1. In General

§ 143. Status of particular waters or classes of waters—Floatable streams

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2523

There is a class of streams, generally denoted as "floatable," which, while not navigable by vessels, are usable for the transportation of certain kinds of property, such as forest products, by floatage, or which are navigable only downstream. In many jurisdictions, sometimes in view of particular conditions, such streams are deemed subject to a public easement for such use, where it is practicable and beneficial, and they are sometimes classified as navigable.[1] On the other hand, streams capable of floating logs, rafts, or other things only at times of high water have been deemed nonnavigable.[2] It has also been said that when determining whether a waterway is navigable, the true test is whether a stream inherently and by its nature has the capacity for valuable floatage, irrespective of the fact of actual use or the extent of such use, and valuable floatage is not determined by what specific size or class of vessel or object can achieve buoyancy in the waterway.[3]

Footnotes

1 Blackman v. Mauldin, 164 Ala. 337, 51 So. 23 (1909); Idaho Northern R. Co. v. Post Falls Lumber & Mfg. Co., 20 Idaho 695, 119 P. 1098 (1911); Ireland v. Bowman & Cockrell, 130 Ky. 153, 113 S.W. 56 (1908); Smart v. Aroostook Lumber Co., 103 Me. 37, 68 A. 527 (1907); State v. Korrer, 127 Minn. 60, 148 N.W. 1095 (1914); Hot Springs Lumber & Mfg. Co. v. Revercomb, 106 Va. 176, 55 S.E. 580 (1906); Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 P. 813 (1904); Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914).

2 U. S. v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 19 S. Ct. 770, 43 L. Ed. 1136 (1899); Gratz v. McKee, 270 F. 713, 23 A.L.R. 1393 (C.C.A. 8th Cir. 1920), aff'd, 260 U.S. 127, 43 S. Ct. 16, 67 L. Ed. 167 (1922) (applying Missouri law); Miller v. State, 124 Tenn. 293, 137 S.W. 760 (1911).

3 Brownlee v. South Carolina Dept. of Health and Environmental Control, 382 S.C. 129, 676 S.E.2d 116 (2009).

The test for navigability is whether the body of water is capable of floating any boat, skiff, or canoe of the shallowest draft used for recreational purposes. FAS, LLC v. Town of Bass Lake, 2007 WI 73, 301 Wis. 2d 321, 733 N.W.2d 287 (2007).

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III. Particular Types of Waters or Water Bodies

C. Navigable Waters

1. In General

§ 144. Status of particular waters or classes of waters—Artificial improvement of bodies of water

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2524, 2529

"Navigable waters" have sometimes been defined as those that are navigable in their natural state or condition,[1] and it has been held that a stream is not navigable in the sense that it is subject to public use if improvement is necessary to make it suitable for such use[2] and that the question of public rights is to be decided without reference to the effect of artificial improvements on navigable capacity.[3] A stream that is not a highway in its ordinary condition cannot be made one by the use of dams or other artificial means, without first legally acquiring the rights of riparian proprietors.[4] Conversely, dams and canals that cause low flow or a dry bed are not considered when determining if a river is navigable because they are not part of the river's natural condition.[5]

There is, however, some authority to the effect that, for some purposes, the navigability of a stream is to be determined on the basis, not only of its natural condition but also of its possible availability for navigation after making reasonable improvements and that it is not necessary that such improvements be actually completed or even authorized.[6] Thus, federal regulatory authority[7] extends to rivers that may become navigable by reasonable improvements.[8]

Artificial bodies of water are not navigable if they never served as a highway of commerce.[9] On the other hand, there is authority that any waterway, manmade or artificial, that is capable of navigation by watercraft constitutes a navigable water, for the purpose of the public trust doctrine.[10]

Footnotes

1 U.S. v. State of Oregon, 295 U.S. 1, 55 S. Ct. 610, 79 L. Ed. 1267 (1935); U.S. v. Holt State Bank, 270 U.S. 49, 46 S. Ct. 197, 70 L. Ed. 465 (1926).

2 State v. Columbia Water Power Co., 82 S.C. 181, 63 S.E. 884 (1909); Hot Springs Lumber & Mfg. Co. v. Revercomb, 106 Va. 176, 55 S.E. 580 (1906).
A stream must be navigable in its natural state, unaided by artificial means, and waters that can be made floatable only by artificial means are not regarded as navigable or as public highways. Sneed v. Weber, 307 S.W.2d 681 (Mo. Ct. App. 1957).

3 Kamm v. Normand, 50 Or. 9, 91 P. 448 (1907).

4 U.S. v. Cress, 243 U.S. 316, 37 S. Ct. 380, 61 L. Ed. 746 (1917); Mashburn v. St. Joe Improvement Co., 19 Idaho 30, 113 P. 92 (1910); Kamm v. Normand, 50 Or. 9, 91 P. 448 (1907).

5 State ex rel. Winkleman v. Arizona Navigable Stream Adjudication Com'n, 224 Ariz. 230, 229 P.3d 242 (Ct. App. Div. 1 2010).

6 U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940).

7 § 151.

8 PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012).

9 Orr v. Mortvedt, 735 N.W.2d 610 (Iowa 2007) (landlocked abandoned quarry); Portage Cty. Bd. of Commrs. v. Akron, 109 Ohio St. 3d 106, 2006-Ohio-954, 846 N.E.2d 478 (2006) (drinking water reservoir behind dam).

10 Fish House, Inc. v. Clarke, 204 N.C. App. 130, 693 S.E.2d 208 (2010).
As to the public trust doctrine, see § 161.

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III. Particular Types of Waters or Water Bodies

C. Navigable Waters

1. In General

§ 145. Statutory declaration or definition of navigability

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2518, 2529

Statutes declaring streams to be navigable have been given effect by the courts.[1] A state legislature has the power to appropriate, by statute, any flowing stream to the use of the public as a highway, subject to the qualification that if a stream is in fact not navigable, a statute declaring it to be navigable will not make it so in law against the preexisting rights of riparian owners unless compensation is made to those owners for the value of the appropriated rights.[2] The enumeration of all the navigable rivers of the state in a statute is held to be exclusive so that no other river is navigable under the laws.[3]

Under particular state statutes, lakes are not navigable streams, while a creek is if it meets the definition in the statute.[4]

Footnotes

1 Donnelly v. U.S., 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913); Allaby v. Mauston Electric Service Co., 135 Wis. 345, 116 N.W. 4 (1908).

2 Brewer-Elliott Oil & Gas Co. v. U.S., 260 U.S. 77, 43 S. Ct. 60, 67 L. Ed. 140 (1922); Hood v. Murphy, 231 Ala. 408, 165 So. 219 (1936); State Engineer v. Cowles Bros., Inc., 86 Nev. 872, 478 P.2d 159 (1970); Ozark-Mahoning Co. v. State, 76 N.D. 464, 37 N.W.2d 488 (1949).

3 Donnelly v. U.S., 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913).

4 Hix v. Robertson, 211 S.W.3d 423 (Tex. App. Waco 2006).

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C. Navigable Waters

1. In General

§ 146. Navigable waters of the United States

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2521, 2522

Law Reviews and Other Periodicals

Gorton, Waters of the United States: "federal jurisdiction over activities on my property?", 75 Bench & Bar 22 (November 2011)

The phrase "navigable waters of the United States" refers to those waters that are subject to the control of the federal government for the regulation of commerce.[1] The navigable waters of the United States are the high seas and such lakes and streams as are navigable in fact, and which, by themselves or their connection with other waters, form or afford a continuous channel or highway for commerce among the states or with foreign countries,[2] or which may be made available for such purpose at reasonable cost.[3] The condition of navigability must refer to commerce of a substantial and permanent character.[4]

Footnotes

1 As to regulation by the federal government, see § 151.

2 PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012); U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940); Economy Light & Power Co. v. U.S., 256 U.S. 113, 41 S. Ct. 409, 65 L. Ed. 847 (1921); Donnelly v. U.S., 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913).
The Army Corps of Engineers' rule extending the definition of "navigable waters" under the Clean Water Act (CWA) to include intrastate waters used as habitat by migratory birds exceeded the authority granted to the Corps under the CWA; therefore, an abandoned sand and gravel pit containing ponds used by migratory birds was not subject to the Corps' jurisdiction under the CWA. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001).
As to what are navigable waters or waters of the United States for the purposes of the disposal permits provision of the Clean Water Act, see Am. Jur. 2d, Pollution Control § 748.

3 U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940).

4 Leovy v. U.S., 177 U.S. 621, 20 S. Ct. 797, 44 L. Ed. 914 (1900).

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III. Particular Types of Waters or Water Bodies

C. Navigable Waters

1. In General

§ 147. Ownership

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2538, 2647 to 2650

New states are admitted to the Union on an equal footing with the original 13 colonies and succeed to the United States' title to beds of navigable waters within their boundaries.[1] For the purpose of state title under the equal footing doctrine, navigability is determined at the time of statehood and based on the natural and ordinary condition of the water at that time; thus, a state does not hold title to riverbeds under segments of a river that were not navigable at the time statehood was granted even if the remainder of the river was navigable and the nonnavigable segments could be traversed by a portage.[2]

Observation:

Although navigability, for the purpose of fixing private rights, is determined using the equal footing doctrine, navigability, for the purpose of the regulation of commerce by the United States,[3] may arise later.[4]

Only lands shoreward of the low-water line—that is, periodically submerged tidelands and inland navigable waters—pass to a state under the equal footing doctrine as the United States has paramount sovereign rights in submerged lands seaward of the

low-water line.[5] Conversely, the paramount rights doctrine does not apply to land under inland navigable waters, such as rivers, harbors, and even tidelands down to the low-water mark.[6]

Although Congress has the power before statehood to convey the land beneath navigable waters, and to reserve that land for the United States, a court deciding the question of title to the bed of a navigable watercourse must begin with the strong presumption against defeating the state's title.[7] Congress may not, after statehood, reserve or convey submerged lands that have already been bestowed upon a state.[8] A conveyance by the United States of land riparian to a navigable river does not include an interest in the riverbed since the ownership of land under navigable waters is an incident of sovereignty.[9] Conversely, an inland river is not navigable at common law where the bed is owned by riparian owners.[10]

The constraints on a state's authority to extinguish the public's rights in land lying seaward of the low-water mark at a navigable harbor reflect its role not as an owner but as a fiduciary for the public.[11] The public owns state waters and has an easement in the water regardless of who owns the water bed beneath.[12] State ownership of navigable waters is not lost through the passage of time or the mistaken payment of property taxes.[13]

The United States holds fee title to the bed of the Potomac River, subject to a public trust for navigation and fishery.[14]

CUMULATIVE SUPPLEMENT

Cases:

A court deciding a question of title to a bed of navigable water within a State's boundaries must begin with a strong presumption against defeat of a State's title. Tarrant Regional Water Dist. v. Herrmann, 133 S. Ct. 2120 (2013).

[END OF SUPPLEMENT]

Footnotes

1 U.S. v. Alaska, 521 U.S. 1, 117 S. Ct. 1888, 138 L. Ed. 2d 231 (1997).
The equal footing doctrine is discussed in Am. Jur. 2d, Constitutional Law § 220; Am. Jur. 2d, States, Territories, and Dependencies § 17.
As to the applicability of the equal footing doctrine to lakes, see § 124.

2 PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012).

3 § 151.

4 U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940).

5 U.S. v. Alaska, 521 U.S. 1, 117 S. Ct. 1888, 138 L. Ed. 2d 231 (1997).
Lands lying below the ordinary high-water mark of navigable rivers are generally owned by the state and are considered to have been so held since the admission of the state to the Union. Northwest Steelheaders Ass'n, Inc. v. Simantel, 199 Or. App. 471, 112 P.3d 383 (2005).

6 Northern Mariana Islands v. U.S., 399 F.3d 1057 (9th Cir. 2005).

7 Idaho v. U.S., 533 U.S. 262, 121 S. Ct. 2135, 150 L. Ed. 2d 326 (2001); U.S. v. Alaska, 521 U.S. 1, 117 S. Ct. 1888, 138 L. Ed. 2d 231 (1997).
A showing that Congress intended to defeat a state's title to submerged lands on an Indian reservation, required to rebut the presumption that a state has equal footing title to lands within its borders, requires a showing of congressional intent; however, the congressional action need not take the form of explicit

ratification of an agreement reserving or conveying title to particular submerged lands. U.S. v. Idaho, 210 F.3d 1067 (9th Cir. 2000), aff'd, 533 U.S. 262, 121 S. Ct. 2135, 150 L. Ed. 2d 326 (2001).

8 Idaho v. U.S., 533 U.S. 262, 121 S. Ct. 2135, 150 L. Ed. 2d 326 (2001).

9 Montana v. U. S., 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

10 Town of North Elba v. Grimditch, 98 A.D.3d 183, 948 N.Y.S.2d 137 (3d Dep't 2012).

11 Arno v. Com., 457 Mass. 434, 931 N.E.2d 1 (2010).

As to the public trust doctrine, see § 161.

12 Conatser v. Johnson, 2008 UT 48, 194 P.3d 897 (Utah 2008).

13 A Tumbling-T Ranches v. Flood Control Dist. of Maricopa County, 222 Ariz. 515, 217 P.3d 1220 (Ct. App. Div. 1 2009).

14 U.S. v. Robertson Terminal Warehouse, Inc., 575 F. Supp. 2d 210 (D.D.C. 2008), aff'd, 630 F.3d 1039 (D.C. Cir. 2011).

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III. Particular Types of Waters or Water Bodies

C. Navigable Waters

1. In General

§ 148. Ownership—Navigational servitude

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2536, 2581, 2584

A waterway that is navigable in fact in its natural state is subject to a dominant[1] navigational servitude by the federal government.[2] A navigational servitude, which generally relieves the federal government of the obligation to pay compensation for acts interfering with the ownership of riparian, littoral, or submerged lands,[3] is distinct from the power to regulate navigable waters[4] and is derived from the principle that all navigable waters are considered public property.[5]

The navigational servitude extends to the entire navigable stream and the stream bed below the ordinary high-water mark.[6] The federal government's navigational servitude does not extend laterally over the entire area covered by the ordinary high waters of a nonnavigable tributary and the areas adjacent to a low water channel that revert to swamp area or a dry condition as waters recede.[7] Bodies of water that are not accessible to the public are exempt from the navigational servitude since they are unsuitable as a highway for travel or commerce.[8] The possible prior navigability of an area in its natural state, while insufficient to impose a navigational servitude as a matter of law, is a relevant factual consideration in determining whether a navigational servitude applies.[9]

Footnotes

1 Parm v. Shumate, 513 F.3d 135 (5th Cir. 2007); Northwest Louisiana Fish & Game Preserve Commission v. U.S., 574 F.3d 1386 (Fed. Cir. 2009).

2 Boone v. U.S., 944 F.2d 1489 (9th Cir. 1991).
As to use of waters subject to a navigational servitude, see § 162.

3 Boone v. U.S., 944 F.2d 1489 (9th Cir. 1991); In re MDL-1824 Tri-State Water Rights Litigation, 644 F.3d 1160 (11th Cir. 2011), cert. denied, 133 S. Ct. 25, 183 L. Ed. 2d 694 (2012).

4 Boone v. U.S., 944 F.2d 1489 (9th Cir. 1991).
As to the power to regulate navigable waters, see § 151.

5 Northwest Louisiana Fish & Game Preserve Commission v. U.S., 574 F.3d 1386 (Fed. Cir. 2009).

6 United Texas Transmission Co. v. U.S. Army Corps of Engineers, 7 F.3d 436 (5th Cir. 1993); Northwest Louisiana Fish & Game Preserve Commission v. U.S., 574 F.3d 1386 (Fed. Cir. 2009); Palm Beach Isles Associates v. U.S., 208 F.3d 1374 (Fed. Cir. 2000), aff'd on reh'g, 231 F.3d 1354 (Fed. Cir. 2000).
"High-water mark" and "ordinary high-water mark" are interchangeable terms used to describe the boundary of the federal navigational servitude; "fast lands" are lands above the high-water mark and thus are not within the scope of the servitude. Banks v. U.S., 71 Fed. Cl. 501 (2006).

7 U.S. v. Harrell, 926 F.2d 1036 (11th Cir. 1991).

8 Dardar v. Lafourche Realty Co., Inc., 55 F.3d 1082 (5th Cir. 1995).

9 Boone v. U.S., 944 F.2d 1489 (9th Cir. 1991).

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C. Navigable Waters

1. In General

§ 149. Proof of navigable status

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2530, 2531

The question of the navigability of a stream or body of water is one of fact, and the burden of proof is on the party asserting navigability.[1]

Observation:

While recognizing that the proponents of navigability have the burden of proof by a preponderance of the evidence, it has also been said that a state commission may not begin its determination with any presumption against navigability; instead, the approach must be wholly impartial and objective.[2] Conversely, navigability is not presumed.[3]

The question whether a watercourse is navigable is one of fact.[4] Even where the navigability of a river, speaking generally, is a matter of common knowledge, and hence one of which judicial notice may be taken, the question of how far navigability extends is to be determined based on the evidence.[5] Each determination concerning navigability must stand on its own facts.[6]

The ultimate conclusion concerning navigability is a question of law inseparable from the particular facts to which the standard is applied.[7] The navigability of a stream is a question for judicial determination, regardless of the survey lines in a land patent.[8]

The fact that the Army Corps of Engineers exercises jurisdiction over a stream is not conclusive that it is navigable, but that fact has weight on that question.[9]

The navigable capacity of a stream or body of water may be shown by its physical characteristics and experimentation, as well as by the uses to which it has been put.[10] The testimony of long-time residents intimately familiar with local waterways or of an expert who has studied the local waterways can support a court's finding on navigability.[11] The navigability of a river may not be inferred from the fact that it is meandered in a government survey of the land through which it flows.[12]

Footnotes

1 Crowell v. Benson, 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598 (1932); Dardar v. Lafourche Realty Co., Inc., 55 F.3d 1082 (5th Cir. 1995); In re River Queen, 275 F. Supp. 403 (W.D. Ark. 1967), judgment aff'd, 402 F.2d 977 (8th Cir. 1968); Boerner v. McCallister, 197 Va. 169, 89 S.E.2d 23 (1955).

2 State ex rel. Winkleman v. Arizona Navigable Stream Adjudication Com'n, 224 Ariz. 230, 229 P.3d 242 (Ct. App. Div. 1 2010).

3 Ricko Const., Inc. v. Dubois, 57 So. 3d 564 (La. Ct. App. 3d Cir. 2011).

4 State ex rel. Winkleman v. Arizona Navigable Stream Adjudication Com'n, 224 Ariz. 230, 229 P.3d 242 (Ct. App. Div. 1 2010); Nichols v. Culotches Bay Navigation Rights Committee, LLC, 2011 Ark. App. 730, 387 S.W.3d 199 (2011); Trahan v. Teleflex, Inc., 922 So. 2d 718 (La. Ct. App. 3d Cir. 2006), writ denied, 927 So. 2d 320 (La. 2006).

5 U.S. v. State of Utah, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931); In re River Queen, 275 F. Supp. 403 (W.D. Ark. 1967), judgment aff'd, 402 F.2d 977 (8th Cir. 1968).

6 U.S. v. State of Utah, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931); Briggs v. Jupiter Hills Lighthouse Marina, 9 So. 3d 29 (Fla. 4th DCA 2009).

7 Briggs v. Jupiter Hills Lighthouse Marina, 9 So. 3d 29 (Fla. 4th DCA 2009).

8 Hix v. Robertson, 211 S.W.3d 423 (Tex. App. Waco 2006).

9 Campbell Brown & Co. v. Elkins, 141 W. Va. 801, 93 S.E.2d 248 (1956).

10 Utah v. U.S., 403 U.S. 9, 91 S. Ct. 1775, 29 L. Ed. 2d 279 (1971); U.S. v. State of Utah, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931).

11 Dardar v. Lafourche Realty Co., Inc., 55 F.3d 1082 (5th Cir. 1995).

12 State of Oklahoma v. State of Texas, 258 U.S. 574, 42 S. Ct. 406, 66 L. Ed. 771 (1922).

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C. Navigable Waters

1. In General

§ 150. Proof of navigable status—Time as of which determined

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2530

Evidence of the actual navigation of a river after its navigability is asserted is admissible for the purpose of showing its status as navigable at a prior time.[1] Accordingly, evidence of present day use may be considered when determining riverbed title under the equal footing doctrine, to the extent it informs the historical determination whether the river segment was susceptible of use for commercial navigation at the time of attaining statehood, but evidence of present day use has little bearing if, for instance, only modern watercraft can use a segment of a river.[2] Also, reliance on a state's long failure to assert title to riverbeds is some evidence that the river segments were nonnavigable for purposes of the equal footing doctrine.[3] Acts of the national government after the admission of a state to the Union with reference to its rivers, such as government investigation, operations under placer claims, and withdrawals for power and reservoir sites, do not have a bearing on the question of navigability at the time of admission to the Union.[4]

Expert and other evidence may be considered in evaluating the navigability at the time of attaining statehood even though the river's condition was depleted by subsequent artificial diversions.[5]

Footnotes

1 U.S. v. State of Utah, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931); Lopez v. Smith, 145 So. 2d 509 (Fla. 2d DCA 1962).

2 PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012).
As to ownership of navigable waters under the equal footing doctrine, see § 147.

3 PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012).

4 U.S. v. State of Utah, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931).

5 State ex rel. Winkleman v. Arizona Navigable Stream Adjudication Com'n, 224 Ariz. 230, 229 P.3d 242 (Ct. App. Div. 1 2010).

Determining the navigability of a segment of a body or channel of water may be accomplished through expert testimony, historical surveys, and news clippings from the relevant time. Lawrence v. Clark County, 254 P.3d 606, 127 Nev. Adv. Op. No. 32 (Nev. 2011).

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C. Navigable Waters

2. Government Control

§ 151. By federal government

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2536

A.L.R. Library

What are "navigable waters" subject to Federal Water Pollution Control Act (33 U.S.C.A. ss 1251 et seq.), 160 A.L.R. Fed. 585

The federal government, by virtue of its constitutional power to regulate interstate and foreign commerce,[1] has paramount control, for such purpose and to the extent necessary, of all the navigable waters of the United States,[2] the regulatory authority of the states being subject to such federal control for the purpose and to the extent stated.[3] Both the state and riparian owners, in the case of navigable waters, hold the waters and the lands under them subject to the power of Congress to control the waters for the purposes of commerce,[4] and the rights of the titleholder are subordinate to the dominant power of the federal government with respect to navigation.[5] Private interests of riparian owners must yield to the government's superior right.[6]

The power of the United States to regulate navigable waters is extremely broad and includes regulation over waterways that are no longer navigable but once were and waters that were never navigable but may become so with reasonable improvements.[7] Commercial disuse of a stream or body of water does not necessarily affect the federal right of control.[8] A river having actual navigable capacity in its natural state, and capable of carrying commerce among the states, is within the power of Congress to

preserve for purposes of future transportation, even though it is not presently used for commerce, and is incapable of such use according to present methods, either by reason of changed conditions or artificial obstructions.[9]

CUMULATIVE SUPPLEMENT

Statutes:

33 U.S.C.A. § 579e, as added effective October 23, 2018, provides that the Secretary of the Army must make publicly available, on a publicly accessible website, information on all federal real estate assets in the United States that are owned, operated, or managed by, or in the custody of, the Corps of Engineers, including existing standardized real estate plat descriptions of assets, and existing geographic information systems and geospatial information associated with such assets.

33 U.S.C.A. § 2201 Note, as added effective June 10, 2014, provides that the Secretary of the Army must establish a pilot program to evaluate the cost effectiveness and project delivery efficiency of allowing non-federal pilot applicants to carry out authorized water resources development projects for coastal harbor improvement, channel improvement, inland navigation, flood damage reduction, aquatic ecosystem restoration, and hurricane and storm damage reduction.

[END OF SUPPLEMENT]

Footnotes

1 Am. Jur. 2d, Commerce §§ 1 et seq.

2 U. S. v. Chicago, M., St. P. & P. R. Co., 312 U.S. 592, 313 U.S. 543, 61 S. Ct. 772, 85 L. Ed. 1064 (1941); U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940).
Congress may vest a federal official with the responsibility to administer a division of interstate streams. Texas v. New Mexico, 462 U.S. 554, 103 S. Ct. 2558, 77 L. Ed. 2d 1 (1983).

3 § 153.

4 U.S. v. Rands, 389 U.S. 121, 88 S. Ct. 265, 19 L. Ed. 2d 329 (1967); Federal Power Commission v. Niagara Mohawk Power Corp., 347 U.S. 239, 74 S. Ct. 487, 98 L. Ed. 666 (1954); U. S. v. Chicago, M., St. P. & P. R. Co., 312 U.S. 592, 313 U.S. 543, 61 S. Ct. 772, 85 L. Ed. 1064 (1941); U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940).
The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States; for this purpose, they are public property of the nation and subject to all the requisite legislation by Congress. In re MDL-1824 Tri-State Water Rights Litigation, 644 F.3d 1160 (11th Cir. 2011), cert. denied, 133 S. Ct. 25, 183 L. Ed. 2d 694 (2012).

5 U.S. v. Rands, 389 U.S. 121, 88 S. Ct. 265, 19 L. Ed. 2d 329 (1967); U. S. v. Chicago, M., St. P. & P. R. Co., 312 U.S. 592, 313 U.S. 543, 61 S. Ct. 772, 85 L. Ed. 1064 (1941).

6 U.S. v. Rands, 389 U.S. 121, 88 S. Ct. 265, 19 L. Ed. 2d 329 (1967); U.S. v. Willow River Power Co., 324 U.S. 499, 65 S. Ct. 761, 89 L. Ed. 1101 (1945).

7 PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012).

8 State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 61 S. Ct. 1050, 85 L. Ed. 1487 (1941); State of Arizona v. State of California, 283 U.S. 423, 51 S. Ct. 522, 75 L. Ed. 1154 (1931).

9 Economy Light & Power Co. v. U.S., 256 U.S. 113, 41 S. Ct. 409, 65 L. Ed. 847 (1921).

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2. Government Control

§ 152. By federal government—Great Lakes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2536

Paramount authority is vested in the federal government with respect to matters relating to or affecting interstate and foreign commerce or treaty obligations pertaining to the Great Lakes, including the level and use of the waters.[1] In the absence of federal legislation, a state does not have the right to divert water from one of the Great Lakes for the purpose of improving the navigability of a river.[2] The interest that the states bordering on a river have in increasing the artificial flow from one of the Great Lakes through that river is not a right but merely a consideration, which may be addressed to Congress to induce a modification of the law prohibiting acts that will affect navigable waters of the United States.[3]

Footnotes

1 State of Wisconsin v. State of Illinois, 278 U.S. 367, 49 S. Ct. 163, 73 L. Ed. 426 (1929); Sanitary Dist. of Chicago v. U.S., 266 U.S. 405, 45 S. Ct. 176, 69 L. Ed. 352 (1925).

2 State of Wisconsin v. State of Illinois, 278 U.S. 367, 49 S. Ct. 163, 73 L. Ed. 426 (1929).

3 Sanitary Dist. of Chicago v. U.S., 266 U.S. 405, 45 S. Ct. 176, 69 L. Ed. 352 (1925).

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§ 153. By state

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2536

As a general rule, subject to certain qualifications subsequently noted, each state has the power to regulate and control the navigable or public waters within its own boundaries.[1] With regard to waters that lie wholly within a state, and which do not constitute a part of the navigable waters of the United States,[2] the authority of the state is complete and exclusive;[3] this is so irrespective of the ownership of the submerged lands.[4] As to navigable waters of the United States, the regulatory power of the state is subject to the paramount authority of the federal government for the regulation of interstate and foreign commerce,[5] but the states may exercise such control as is consistent with federal action or functions[6] and does not materially or unreasonably interfere with or burden commerce.[7] Absent congressional legislation, states may enact statutes regulating the erection of bridges, dams, and other structures constituting obstructions to navigation or otherwise pertaining to navigation.[8]

The powers of states admitted to the Union after its establishment are, in general, the same as those of the 13 original states, in the absence of any provision to the contrary.[9]

CUMULATIVE SUPPLEMENT

Cases:

The Commonwealth retains the right of jus privatum, the right of private property retained by the Commonwealth because it is proprietor of the public domain, including subaqueous bottomland, that has not been lawfully conveyed; this is the

Commonwealth's authority to act in a proprietary capacity because it also has the right and title of a private owner. Virginia Marine Resources Com'n v. Chincoteague Inn, 757 S.E.2d 1 (Va. 2014).

[END OF SUPPLEMENT]

Footnotes

1 Sands v. Manistee River Imp. Co., 123 U.S. 288, 8 S. Ct. 113, 31 L. Ed. 149 (1887); Colberg, Inc. v. State ex rel. Dept. of Public Works, 67 Cal. 2d 408, 62 Cal. Rptr. 401, 432 P.2d 3 (1967); State v. Gerbing, 56 Fla. 603, 47 So. 353 (1908); Michaelson v. Silver Beach Imp. Ass'n, Inc., 342 Mass. 251, 173 N.E.2d 273, 91 A.L.R.2d 846 (1961); People v. Steeplechase Park Co., 218 N.Y. 459, 113 N.E. 521 (1916); State v. Cleveland & P. R. Co., 94 Ohio St. 61, 113 N.E. 677 (1916); State v. Haskell, 84 Vt. 429, 79 A. 852 (1911); City of Milwaukee v. State, 193 Wis. 423, 214 N.W. 820, 54 A.L.R. 419 (1927).
A navigable body of water is publicly owned and may only be regulated by the Commonwealth. Dumm v. Dahl, 2006 PA Super 326, 913 A.2d 863 (2006).

2 § 146.

3 Fox River Paper Co. v. Railroad Com'n of Wisconsin, 274 U.S. 651, 47 S. Ct. 669, 71 L. Ed. 1279 (1927); North Shore Boom & Driving Co v. Nicomen Boom Co, 212 U.S. 406, 29 S. Ct. 355, 53 L. Ed. 574 (1909); Atwood v. Hammond, 4 Cal. 2d 31, 48 P.2d 20 (1935); People v. Steeplechase Park Co., 218 N.Y. 459, 113 N.E. 521 (1916); Dumm v. Dahl, 2006 PA Super 326, 913 A.2d 863 (2006).

4 Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).

5 Silas Mason Co. v. Tax Com'n of State of Washington, 302 U.S. 186, 58 S. Ct. 233, 82 L. Ed. 187 (1937); U.S. v. State of Utah, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931); Henry Ford & Son v. Little Falls Fibre Co., 280 U.S. 369, 50 S. Ct. 140, 74 L. Ed. 483 (1930); State of New Jersey v. Sargent, 269 U.S. 328, 46 S. Ct. 122, 70 L. Ed. 289 (1926); Colberg, Inc. v. State ex rel. Dept. of Public Works, 67 Cal. 2d 408, 62 Cal. Rptr. 401, 432 P.2d 3 (1967); Michaelson v. Silver Beach Imp. Ass'n, Inc., 342 Mass. 251, 173 N.E.2d 273, 91 A.L.R.2d 846 (1961).

6 Silas Mason Co. v. Tax Com'n of State of Washington, 302 U.S. 186, 58 S. Ct. 233, 82 L. Ed. 187 (1937).
The navigable waters of the United States are public property and cannot be obstructed or impeded so as to impair the right to their navigation although a state may exact a reasonable harbor fee to defray the costs of harbor traffic. LCM Enterprises, Inc. v. Town of Dartmouth, 14 F.3d 675 (1st Cir. 1994).
A regulation establishing a special federal anchorage area in a Hawaiian lagoon did not preempt additional state regulation within that area, absent any actual conflict between Hawaii and federal regulations. Barber v. State of Hawai'i, 42 F.3d 1185 (9th Cir. 1994).

7 Am. Jur. 2d, Commerce §§ 28 et seq.

8 Manigault v. Springs, 199 U.S. 473, 26 S. Ct. 127, 50 L. Ed. 274 (1905).

9 Borax Consolidated v. City of Los Angeles, 296 U.S. 10, 56 S. Ct. 23, 80 L. Ed. 9 (1935); Donnelly v. U.S., 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913); Scott v. Lattig, 227 U.S. 229, 33 S. Ct. 242, 57 L. Ed. 490 (1913).

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§ 154. Exercise, surrender, or delegation of authority

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2536

It is the duty of the state or other government authority to retain and exercise in the public interest its control of the navigable waters within its borders.[1] This power may not be surrendered, alienated, or delegated except for some public purpose or some reasonable use that can fairly be said to be for a public benefit.[2]

States may delegate their exclusive sovereign power with respect to navigable waters to municipalities,[3] but such authority is limited to what is explicitly granted by the State.[4]

Footnotes

1 Board of Park Com'rs of City of Des Moines v. Diamond Ice Co., 130 Iowa 603, 105 N.W. 203 (1905); Long Sault Development Co. v. Kennedy, 212 N.Y. 1, 105 N.E. 849 (1914); State v. West Tennessee Land Co., 127 Tenn. 575, 158 S.W. 746 (1913).

2 State v. Gerbing, 56 Fla. 603, 47 So. 353 (1908); Long Sault Development Co. v. Kennedy, 212 N.Y. 1, 105 N.E. 849 (1914); Hazen v. Perkins, 92 Vt. 414, 105 A. 249, 23 A.L.R. 748 (1918); Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914).

3 DiPietro v. Zoning Bd. of Appeals of City of Milford, 93 Conn. App. 314, 889 A.2d 269 (2006) (municipal action in furtherance of a municipality's statutory responsibilities was not preempted); Mad Maxine's Watersports, Inc. v. Harbormaster of Provincetown, 67 Mass. App. Ct. 804, 858 N.E.2d 760 (2006).

Cities have jurisdiction over navigable waters within their corporate limits and exercise police power to regulate public and private use of those waters. Northlake Marine Works, Inc. v. State, Dept. of Natural Resources, 134 Wash. App. 272, 138 P.3d 626 (Div. 1 2006).

4 City of Montpelier v. Barnett, 2012 VT 32, 49 A.3d 120 (Vt. 2012).

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§ 155. Extent of control

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2536 to 2538

The power of the United States over navigable waters extends to any matter that may properly be considered a regulation of interstate or foreign commerce on those waters and is not limited to control for purposes of navigation.[1] The federal government may control all structures and works that interfere in any manner with the navigable capacity of the navigable waters of the United States[2] and may make the erection or maintenance of a structure in a navigable stream depend on a license granted on such terms or conditions as it may impose.[3] The federal government may change the course of a navigable stream.[4] Congress has the constitutional power to regulate navigable streams completely, to the total exclusion of private power companies or port owners.[5] However, Congress may not arbitrarily destroy or impair the rights of riparian owners by legislation that does not have a real or substantial relation to the control of navigation or appropriateness to that end.[6]

The ownership of submerged lands—which carries with it the power to control navigation, fishing, and other public uses of water—is an essential attribute of sovereignty.[7] The power of Congress over navigable waters may be exercised over the nonnavigable stretches of a river to preserve or promote commerce on the navigable portions.[8]

A state administrative agency may not, by administrative rule, narrow its statutory authority and duties to protect the public's rights in navigable waters.[9]

A state's navigation statute does not displace local land use laws on navigable waters that are not owned by the state in its sovereign capacity.[10]

Footnotes

1 U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940).
Congress has the power under the Commerce Clause to regulate the nation's waters to limit pollution, prevent obstructions to navigation, reduce flooding, and control watershed development. U.S. v. Hubenka, 438 F.3d 1026, 69 Fed. R. Evid. Serv. 593 (10th Cir. 2006).

2 U. S. v. Chicago, M., St. P. & P. R. Co., 312 U.S. 592, 313 U.S. 543, 61 S. Ct. 772, 85 L. Ed. 1064 (1941); U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940).

3 U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940); State of New Jersey v. Sargent, 269 U.S. 328, 46 S. Ct. 122, 70 L. Ed. 289 (1926).

4 U.S. v. Rands, 389 U.S. 121, 88 S. Ct. 265, 19 L. Ed. 2d 329 (1967).

5 U.S. v. Rands, 389 U.S. 121, 88 S. Ct. 265, 19 L. Ed. 2d 329 (1967).

6 U.S. v. River Rouge Improvement Co., 269 U.S. 411, 46 S. Ct. 144, 70 L. Ed. 339 (1926).

7 U.S. v. Alaska, 521 U.S. 1, 117 S. Ct. 1888, 138 L. Ed. 2d 231 (1997).
As to ownership of navigable waters, see § 147.

8 State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 61 S. Ct. 1050, 85 L. Ed. 1487 (1941).
Congressional authority to regulate the nation's waters under the Commerce Clause is not limited to navigable-in-fact waters; it exists throughout watersheds and encompasses actions on nonnavigable, intrastate tributaries. U.S. v. Hubenka, 438 F.3d 1026, 69 Fed. R. Evid. Serv. 593 (10th Cir. 2006).

9 Baer v. Wisconsin Dept. of Natural Resources, 2006 WI App 225, 297 Wis. 2d 232, 724 N.W.2d 638 (Ct. App. 2006).

10 Town of North Elba v. Grimditch, 98 A.D.3d 183, 948 N.Y.S.2d 137 (3d Dep't 2012).

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§ 156. Extent of control—Development of waterpower

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2536 to 2538

The power of the federal government with respect to navigable streams includes control and regulation of the development and utilization of the waterpower of those streams, and private property rights in the flow of such a stream may not be asserted against the government's rights.[1] The federal government may lease any excess of waterpower that results from the conservation of the flow of the river and the works the government may construct.[2]

Footnotes

1 U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940).

2 U.S. v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 33 S. Ct. 667, 57 L. Ed. 1063 (1913).

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§ 157. Extent of control—Harbors

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2557, 2558

The federal government, in the exercise of its authority to regulate commerce on navigable waters, may define limits for the erection of wharves, piers, docks, or other structures or the deposit of materials in the waters.[1] Such lines or limits may also be established by a state, by statute, or through an administrative agency[2] in the absence of any existing, and subject to any future, federal action.[3] Federal legislation respecting the location of harbor lines has been construed in some instances as not intended to affect or supersede state action with respect to waters situated wholly within the state.[4] Normal preemption analysis applies.[5]

Under the public trust doctrine,[6] a state may regulate the construction and maintenance of wharves over state-owned land to protect public use of the waterway.[7] A state may exact reasonable harbor fees to defray the costs of harbor traffic.[8]

A state port authority law does not necessarily preempt a local government's authority to develop a port or terminal.[9] A city's shoreline master program, limiting dock and pier development within an undeveloped harbor area and prohibiting single-family private docks, did not dispose of the state's interest in shore lands in such a way as to impair the public's right of access but instead protected the public interest in navigational and recreational use of the harbor.[10]

Footnotes

1 Port of Seattle v. Oregon & W. R. Co., 255 U.S. 56, 41 S. Ct. 237, 65 L. Ed. 500 (1921); Philadelphia Co. v. Stimson, 223 U.S. 605, 32 S. Ct. 340, 56 L. Ed. 570 (1912).

If a wharf below the mean high water line is likely to affect navigation, Congress may prevent its rebuilding without entitling the owner to compensation. Willink v. U.S., 240 U.S. 572, 36 S. Ct. 422, 60 L. Ed. 808 (1916).

2 Prosser v. Northern Pac. R. Co., 152 U.S. 59, 14 S. Ct. 528, 38 L. Ed. 352 (1894); State v. Cleveland & P. R. Co., 94 Ohio St. 61, 113 N.E. 677 (1916).

3 Philadelphia Co. v. Stimson, 223 U.S. 605, 32 S. Ct. 340, 56 L. Ed. 570 (1912).

4 Montgomery v. City of Portland, 190 U.S. 89, 23 S. Ct. 735, 47 L. Ed. 965 (1903).

5 U.S. v. Massachusetts, 493 F.3d 1 (1st Cir. 2007).

6 § 161.

7 State, Dept. of Natural Resources v. Alaska Riverways, Inc., 232 P.3d 1203 (Alaska 2010).

8 LCM Enterprises, Inc. v. Town of Dartmouth, 14 F.3d 675 (1st Cir. 1994).

9 South Carolina State Ports Authority v. Jasper County, 368 S.C. 388, 629 S.E.2d 624 (2006).

10 Samson v. City of Bainbridge Island, 149 Wash. App. 33, 202 P.3d 334 (Div. 2 2009).

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3. Improvement

§ 158. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2540 to 2552

As a general rule, a state has the authority to make improvements in navigable waters that are beneficial to their use by the public for the purposes of navigation.[1] However, a municipality that has parted with public property in tideland on its waterfront may not dredge it for the improvement of navigation.[2]

The federal government is invested with authority to improve or provide for the improvement of the navigable waters of the United States, as an incident of its power to regulate commerce.[3] This power of Congress may be exercised to any extent it may deem necessary to insure free navigation.[4] The federal government's dominant servitude[5] defines the limits within which Congress may improve navigation without creating an obligation to pay just compensation under the Fifth Amendment.[6] The fact that purposes other than navigation, such as irrigation and power development, will also be served by the construction of a dam in aid of navigation does not prevent federal authorization of that project even if those other purposes would not alone have justified an exercise of congressional power.[7]

The necessity for a proposed improvement, and the mode and extent of improvement, are to be determined by the controlling legislative or government authority.[8] Private individuals do not have the right to compel a state to remove obstacles to navigation.[9] A state is not required to preserve the navigability of its waters because the public may desire to shoot wild game there.[10]

Footnotes

1 Tempel v. U.S., 248 U.S. 121, 39 S. Ct. 56, 63 L. Ed. 162 (1918); Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 33 S. Ct. 679, 57 L. Ed. 1083 (1913); Union Bridge Co. v. U S, 204 U.S. 364, 27 S. Ct. 367, 51 L. Ed. 523 (1907).

2 Appleby v. City of New York, 271 U.S. 364, 46 S. Ct. 569, 70 L. Ed. 992 (1926).

3 U.S. v. Willow River Power Co., 324 U.S. 499, 65 S. Ct. 761, 89 L. Ed. 1101 (1945); U. S. v. Chicago, M., St. P. & P. R. Co., 312 U.S. 592, 313 U.S. 543, 61 S. Ct. 772, 85 L. Ed. 1064 (1941); Trinityfarm Const. Co. v. Grosjean, 291 U.S. 466, 54 S. Ct. 469, 78 L. Ed. 918 (1934); Pigeon River Imp., Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 54 S. Ct. 361, 78 L. Ed. 695 (1934).

4 U.S. v. Bellingham Bay Boom Co., 176 U.S. 211, 20 S. Ct. 343, 44 L. Ed. 437 (1900).

5 § 148.

6 Northwest Louisiana Fish & Game Preserve Commission v. U.S., 574 F.3d 1386 (Fed. Cir. 2009).

7 State of Arizona v. State of California, 283 U.S. 423, 51 S. Ct. 522, 75 L. Ed. 1154 (1931).

8 U. S. v. Chicago, M., St. P. & P. R. Co., 312 U.S. 592, 313 U.S. 543, 61 S. Ct. 772, 85 L. Ed. 1064 (1941). State agencies have broad discretion, under the applicable statutes, in determining whether a particular dredging project should be placed on a priority list. Township of Neptune v. State, Dept. of Environmental Protection, 425 N.J. Super. 422, 41 A.3d 792 (App. Div. 2012).

9 Kitsap County Transp. Co., Inc. v. City of Seattle, 75 Wash. 673, 135 P. 476 (1913).

10 Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 P. 532 (1907).

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3. Improvement

§ 159. Division of federal and state authority

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2541

The paramount authority of the federal government with respect to the regulation of interstate and foreign commerce[1] carries with it the primary authority and jurisdiction, between itself and the states, to improve or provide for the improvement of the navigable waters of the United States for that purpose.[2] However, the interest of the states in their own domestic commerce is such that the authority of Congress is not necessarily exclusive of state action.[3] Until Congress exercises its power over the subject, action by the state may not be challenged by private persons.[4]

Where the object of federal legislation is to keep the navigable waters of the United States clear and unobstructed, supplemental state legislation in furtherance of that design is in aid of commerce and, where not in conflict with any legislation adopted by Congress, is upheld.[5]

Footnotes

1 Am. Jur. 2d, Commerce §§ 1 et seq.

2 State of Arizona v. State of California, 283 U.S. 423, 51 S. Ct. 522, 75 L. Ed. 1154 (1931).

3 Leovy v. U.S., 177 U.S. 621, 20 S. Ct. 797, 44 L. Ed. 914 (1900).

4 Boutwell v. Champlain Realty Co., 89 Vt. 80, 94 A. 108 (1915).

5 Hagan v. City of Richmond, 104 Va. 723, 52 S.E. 385 (1905).

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4. Use; Public and Riparian Rights

a. In General

§ 160. Equal right of public

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2535, 2581, 2582, 2589

A.L.R. Library

Rights of fishing, boating, bathing, or the like in inland lakes, 57 A.L.R.2d 569

Law Reviews and Other Periodicals

Giles, A call to action: expanding public access to Ohio's navigable rivers and streams, 39 Cap. U. L. Rev. 993 (Fall 2011)

Kalo, "It's navigable in fact so I can fish in it": the public right to use manmade, navigable-in-fact waters of Coastal North Carolina, 89 N.C. L. Rev. 2095 (September 2011)

The public has the right to the free use of all navigable or public waters.[1] All persons have a right to use the navigable waters of a state so long as they do not interfere with their use by other citizens and subject to regulation by the state under its police powers.[2] No one has an exclusive right to use navigable waters unless the legislature has granted it.[3]

While everyone has an equal right to use navigable waters, each must regulate one's use so as not to interfere unreasonably with the rights of others[4] and is obliged to exercise ordinary care and caution, having due regard to the rights, property, and lives of others.[5] Conversely, all members of the public have an equal right to reasonable use, but the enjoyment by one necessarily interferes, to some extent and for the time being, with the absolutely free and unimpeded use of the body of water by others.[6]

CUMULATIVE SUPPLEMENT

Cases:

For either category of navigable waterway, both title-navigable waters and navigable-in-fact waters, the public has the paramount right to the use of the waters. McCormick v. State by and through Oregon State Parks and Recreation Department, 366 Or. 452, 466 P.3d 10 (2020).

Remand was warranted for trial court to determine whether public easement granting right to touch privately owned beds of state waters in ways incidental to all recreational rights to those waters was land acquired and accepted by State under terms of Utah Constitution, such that Public Waters Access Act (PWAA) unconstitutionally restricted easement in action by organization committed to maintaining public access to rivers and streams in state asserting constitutional right of its members to wade in waters of river flowing through private land; common law trust principles had been applied when easement was recognized and, thus, it was still to be determined whether easement fell under protections of Constitution. Utah Const. art. 20, § 1; Utah Code Ann. § 73-29-101 et seq. Utah Stream Access Coalition v. VR Acquisitions, LLC, 439 P.3d 593 (Utah 2019).

[END OF SUPPLEMENT]

Footnotes

1 Mashburn v. St. Joe Improvement Co., 19 Idaho 30, 113 P. 92 (1910); Schulte v. Warren, 218 Ill. 108, 75 N.E. 783 (1905); Witke v. State Conservation Commission, 244 Iowa 261, 56 N.W.2d 582 (1953); Tuell v. Inhabitants of Marion, 110 Me. 460, 86 A. 980 (1913); Butler v. Attorney General, 195 Mass. 79, 80 N.E. 688 (1907); State v. Columbia Water Power Co., 82 S.C. 181, 63 S.E. 884 (1909); Diversion Lake Club v. Heath, 58 S.W.2d 566 (Tex. Civ. App. Austin 1933), aff'd, 126 Tex. 129, 86 S.W.2d 441 (1935); Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 (1900).

2 Witke v. State Conservation Commission, 244 Iowa 261, 56 N.W.2d 582 (1953).
If water is navigable, members of the public have the right to use it at any point below the high-water mark. State v. Hatchie Coon Hunting and Fishing Club, Inc., 98 Ark. App. 206, 254 S.W.3d 11 (2007), rev'd on other grounds, 372 Ark. 547, 279 S.W.3d 56 (2008).

3 TH Investments, Inc. v. Kirby Inland Marine, L.P., 218 S.W.3d 173 (Tex. App. Houston 14th Dist. 2007).

4 Henderson v. Doniphan Lumber Co., 94 Ark. 370, 127 S.W. 459 (1910); Smart v. Aroostook Lumber Co., 103 Me. 37, 68 A. 527 (1907).

5 Henderson v. Doniphan Lumber Co., 94 Ark. 370, 127 S.W. 459 (1910); Idaho Northern R. Co. v. Post Falls Lumber & Mfg. Co., 20 Idaho 695, 119 P. 1098 (1911); Adams v. Carey, 172 Md. 173, 190 A. 815 (1937); Mitchell v. Lea Lumber Co., 43 Wash. 195, 86 P. 405 (1906).

6 Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 57 Fla. 399, 48 So. 643 (1909); Cromartie v. Stone, 194 N.C. 663, 140 S.E. 612 (1927).

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4. Use; Public and Riparian Rights

a. In General

§ 161. Public trust doctrine

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2519, 2535, 2580

A.L.R. Library

Rights of fishing, boating, bathing, or the like in inland lakes, 57 A.L.R.2d 569

Law Reviews and Other Periodicals

Blumm and Doot, Oregon's public trust doctrine: public rights in waters, wildlife, and beaches, 42 Envtl. L. 375 (Winter 2012)

Blumm, The public trust doctrine and private property: the accommodation principle, 27 Pace Envtl. L. Rev. 649 (Summer 2010)

Stoner, Leading a judge to water: in search of a more fully formed Washington public trust doctrine, 85 Wash. L. Rev. 391 (May 2010)

Under the public trust doctrine, all public waters are held in trust by the state for the use and enjoyment of the public.[1] The State may not convey or give away this public trust interest.[2]

Under the public trust doctrine, the State may regulate a riparian owner's use of adjacent state-owned property to protect recreational and other public purposes, including the right to fish, hunt, bathe, swim, and use navigable waters for boating and general recreation purposes.[3] Enforcement of the public trust may be delegated to municipalities,[4] but any such regulation must be derived from and limited to the state's power.[5]

A riparian landowner may invoke the public trust doctrine as a defense to another possessor's trespass action so long as the doctrine is not invoked to litigate the state's rights but to ensure that the owner was not prevented from enjoying those rights.[6]

CUMULATIVE SUPPLEMENT

Cases:

The public trust doctrine is more than an affirmation of state power to use public property for public purposes; it is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands, and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust. San Francisco Baykeeper, Inc. v. California State Lands Commission, 242 Cal. App. 4th 202, 194 Cal. Rptr. 3d 880 (1st Dist. 2015).

Pursuant to the public trust doctrine of the state constitution, the public trust is the duty and authority to maintain the purity and flow of waters for future generations and to assure that the waters of the land are put to reasonable and beneficial uses. Const. Art. 11, § 1. Kauai Springs, Inc. v. Planning Com'n of County of Kauai, 324 P.3d 951 (Haw. 2014).

Nevada's water statutes constrain water allocations to those that are public uses and require the State Engineer to reject permits if they are unnecessary or detrimental to the public interest; these considerations are consistent with the public trust doctrine. Nev. Rev. St. §§ 533.025, 533.325, 533.370(2), 533.370(3)(c)-(d). Mineral County v. Lyon County, 473 P.3d 418, 136 Nev. Adv. Op. No. 58 (Nev. 2020).

The atmosphere is not a public trust resource within meaning of public trust doctrine, which applies to navigable waterways and the lands underlying those waterways. Chernaik v. Brown, 367 Or. 143, 475 P.3d 68 (2020).

The public trust doctrine is a forward-looking doctrine that is flexible enough to accommodate future uses and to protect against unforeseen harms to the public's ability to use public trust resources. Chernaik v. Brown, 367 Or. 143, 475 P.3d 68 (2020).

The public trust doctrine vests the ownership of land under lakes, i.e., lake beds, in the state; by contrast, the public trust doctrine gives riparian owners along navigable streams a qualified title in the stream beds to the center of the stream, while the state holds the navigable waters in trust for the public. W.S.A. Const. Art. 9, § 1. Rock-Koshkonong Lake Dist. v. State Dept. of Natural Resources, 2013 WI 74, 833 N.W.2d 800 (Wis. 2013).

[END OF SUPPLEMENT]

Footnotes

1 St. Croix Waterway Ass'n v. Meyer, 178 F.3d 515 (8th Cir. 1999); El Dorado Irr. Dist. v. State Water Resources Control Bd., 142 Cal. App. 4th 937, 48 Cal. Rptr. 3d 468 (3d Dist. 2006); Brannon v. Boldt, 958 So. 2d 367 (Fla. 2d DCA 2007); Bauman v. Woodlake Partners, LLC, 199 N.C. App. 441, 681 S.E.2d 819 (2009).

The public trust doctrine refers to the body of common law under which the state holds in trust for public use title in waters and submerged lands waterward of the mean high tide line. Murphy v. EAPWJP, LLC, 123 Conn. App. 316, 1 A.3d 1171 (2010), appeal dismissed, 306 Conn. 391, 50 A.3d 316 (2012).

Pursuant to the public trust doctrine, the public has a right to use the ocean, subject to certain government regulation. McGarvey v. Whittredge, 2011 ME 97, 28 A.3d 620 (Me. 2011).

If a body of water in its natural condition can be navigated by watercraft, then it is navigable in fact and therefore navigable in law, and lands lying beneath it are thus subject to the public trust doctrine. Gwathmey v. State Through Dept. of Environment, Health, and Natural Resources Through Cobey, 342 N.C. 287, 464 S.E.2d 674 (1995).

2 Lake Union Drydock Co., Inc. v. State Dept. of Natural Resources, 143 Wash. App. 644, 179 P.3d 844 (Div. 2 2008).

3 State, Dept. of Natural Resources v. Alaska Riverways, Inc., 232 P.3d 1203 (Alaska 2010); Bauman v. Woodlake Partners, LLC, 199 N.C. App. 441, 681 S.E.2d 819 (2009); Lake Beulah Management Dist. v. State Dept. of Natural Resources, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73 (2011).

Under a state constitution and the public trust doctrine, the public owns an in-stream, nondiversionary right to the recreational use of the state's navigable surface waters, and a private party may not interfere with that right. Montana Trout Unlimited v. Beaverhead Water Co., 2011 MT 151, 361 Mont. 77, 255 P.3d 179 (2011).

The State is the exclusive steward of public trust rights, a bundle of all useful and lawful purposes, such as the common law right to recreational boating. Lakeside Lodge, Inc. v. Town of New London, 158 N.H. 164, 960 A.2d 1268 (2008).

4 Mad Maxine's Watersports, Inc. v. Harbormaster of Provincetown, 67 Mass. App. Ct. 804, 858 N.E.2d 760 (2006); City of Montpelier v. Barnett, 2012 VT 32, 49 A.3d 120 (Vt. 2012).

5 City of Montpelier v. Barnett, 2012 VT 32, 49 A.3d 120 (Vt. 2012).

6 Fish House, Inc. v. Clarke, 204 N.C. App. 130, 693 S.E.2d 208 (2010).

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a. In General

§ 162. Navigational servitude or public easement doctrine

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2581

A.L.R. Library

Rights of fishing, boating, bathing, or the like in inland lakes, 57 A.L.R.2d 569

Waters encumbered by a navigational servitude are subject to public use as continuous highways for the purpose of navigation in interstate commerce.[1] Under the navigation servitude, an individual's private right of access must yield to a public right that cannot otherwise be accommodated.[2]

A landowner whose property contains navigable waterways may escape a navigational servitude by showing either that the waterways are not navigable in their natural state or, if naturally navigable, by demonstrating that the owner's interests outweigh those of the public.[3]

Observation:

Although the navigation servitude is most often employed by the federal government, a state navigation servitude, inferior only to the federal servitude, exists, and is separate from the public trust doctrine, although it may be used to accomplish trust purposes.[4]

The federal navigational servitude does not encompass recreational fishing nor create a right to fish on private riparian land.[5] However, a state policy granting the public an easement in state waters recognizes an interest of the public in the use of those waters for recreational purposes.[6]

Footnotes

1 Dardar v. Lafourche Realty Co., Inc., 55 F.3d 1082 (5th Cir. 1995).
As to the navigational servitude of the federal government, see § 148.

2 Zack's, Inc. v. City of Sausalito, 165 Cal. App. 4th 1163, 81 Cal. Rptr. 3d 797 (1st Dist. 2008) (stating that the state's power to subordinate the private to the public right is sometimes said to be absolute).

3 Dardar v. Lafourche Realty Co., Inc., 55 F.3d 1082 (5th Cir. 1995).

4 Zack's, Inc. v. City of Sausalito, 165 Cal. App. 4th 1163, 81 Cal. Rptr. 3d 797 (1st Dist. 2008).

5 Parm v. Shumate, 513 F.3d 135 (5th Cir. 2007).

6 Conatser v. Johnson, 2008 UT 48, 194 P.3d 897 (Utah 2008) (further stating that recreational rights include the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing those waters). The public has the right to use navigable waters for navigation, commerce, fishing, and bathing and other easements allowed by law. Brannon v. Boldt, 958 So. 2d 367 (Fla. 2d DCA 2007).

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§ 163. Use as "public highway"

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2582

Every stream or body of water navigable in fact is regarded as a public highway and subject to free and unobstructed navigation by the public,[1] whether the title to the soil is in the public or in the riparian owners.[2]

Footnotes

1 Northern Transp. Co. v. City of Chicago, 99 U.S. 635, 25 L. Ed. 336, 1878 WL 18229 (1878); Daniels v. Carney, 148 Ala. 81, 42 So. 452 (1906); Colberg, Inc. v. State ex rel. Dept. of Public Works, 67 Cal. 2d 408, 62 Cal. Rptr. 401, 432 P.2d 3 (1967); Town of Orange v. Resnick, 94 Conn. 573, 109 A. 864, 10 A.L.R. 1046 (1920); State ex rel. Wilcox v. T. O. L., Inc., 206 So. 2d 69 (Fla. 4th DCA 1968); Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 57 Fla. 399, 48 So. 643 (1909); Parsons v. E.I. Du Pont De Nemours Powder Co., 198 Mich. 409, 164 N.W. 413 (1917); Macrum v. Hawkins, 261 N.Y. 193, 184 N.E. 817 (1933); Gaither v. Albemarle Hospital, 235 N.C. 431, 70 S.E.2d 680 (1952); Anderson v. Columbia Contract Co., 94 Or. 171, 185 P. 231 (1919).

2 Willink v. U.S., 240 U.S. 572, 36 S. Ct. 422, 60 L. Ed. 808 (1916).

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4. Use; Public and Riparian Rights

a. In General

§ 164. Use as "public highway"—Character and extent of right

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2582, 2585

The right to use watercourses as highways and the right to use highways on land are said to be analogous and to depend on the same general principles.[1] One's right to navigate a public river is not a private but is a public right, to which one is entitled only in common with the whole public.[2] Furthermore, the exercise of the public right of navigation may be properly regulated or limited under the police power in the interest of the general welfare.[3]

The public is entitled to use a navigable water, as a public highway, for the purposes of travel, either for business or pleasure.[4] The right of navigation includes incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.[5]

Footnotes

1 Henderson v. Doniphan Lumber Co., 94 Ark. 370, 127 S.W. 459 (1910); Cromartie v. Stone, 194 N.C. 663, 140 S.E. 612 (1927).

2 Frost v. Washington County R. Co., 96 Me. 76, 51 A. 806 (1901); Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914).

3 State ex rel. Wilcox v. T. O. L., Inc., 206 So. 2d 69 (Fla. 4th DCA 1968).

4 Brownlee v. South Carolina Dept. of Health and Environmental Control, 382 S.C. 129, 676 S.E.2d 116 (2009).

The public has the right to unobstructed navigation as a public highway, for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, that are capable of such use in their natural condition. Bauman v. Woodlake Partners, LLC, 199 N.C. App. 441, 681 S.E.2d 819 (2009).

5 Samson v. City of Bainbridge Island, 149 Wash. App. 33, 202 P.3d 334 (Div. 2 2009).

It is a state's policy to provide for the management of the shorelines by planning for and fostering all reasonable and appropriate uses; this policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally the public right of navigation and corollary rights incident to it. May v. Robertson, 153 Wash. App. 57, 218 P.3d 211 (Div. 2 2009), as corrected, (Dec. 8, 2009) and as corrected, (Mar. 23, 2010).

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§ 165. Use as "public highway"—Alienation or loss of right

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2583

Since a navigable stream, unlike a highway on land, is not created or established by any public agency, it may not be discontinued or abandoned by such an agency.[1] The public rights in public waters may not be alienated, or made subject to easements, except by legislative action.[2]

The public right of navigation is not lost by nonuse.[3]

Footnotes

1 Trullinger v. Howe, 53 Or. 219, 97 P. 548 (1908), modified on other grounds on reh'g, 53 Or. 219, 99 P. 880 (1909).

2 State v. Hutchins, 79 N.H. 132, 105 A. 519, 2 A.L.R. 1685 (1919).

3 State v. Hutchins, 79 N.H. 132, 105 A. 519, 2 A.L.R. 1685 (1919).

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4. Use; Public and Riparian Rights

b. Relationship Between Navigational and Riparian Rights

§ 166. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2588

Law Reviews and Other Periodicals

Williams, Riparian landowners versus the public: the importance of roads and highways for public access to Wisconsin's navigable waters, 2010 Wis. L. Rev. 185 (January-February 2010)

As a general proposition, the rights of riparian proprietors in adjacent navigable waters are subject or subordinate to the public right of navigation.[1] Accordingly, the damages a riparian proprietor may sustain as a natural and unavoidable consequence of the navigation of a stream, either with boats and other craft or rafts and logs, where such navigation is conducted with due care and in a reasonably prudent manner, are not compensable.[2]

A state may, by statute, exercise its authority to affect riparian rights to protect the public's rights to fishing, bird hunting, and navigation.[3]

Footnotes

1 U.S. v. Willow River Power Co., 324 U.S. 499, 65 S. Ct. 761, 89 L. Ed. 1101 (1945).

Because a state retains title to all public waters, a property owner with a riparian right of access may use those waters, but that right is burdened with a servitude in favor of the State in the exercise of its trust power over navigable waters. CRV Enterprises, Inc. v. U.S., 86 Fed. Cl. 758 (2009), aff'd, 626 F.3d 1241 (Fed. Cir. 2010), cert. denied, 131 S. Ct. 2459, 179 L. Ed. 2d 1211 (2011).

A riparian owner has a qualified right to the land between the actual water level and the ordinary high-water mark—the owner may exclude the public from there but may not interfere with the rights of the public for navigation purposes. State v. McFarren, 62 Wis. 2d 492, 215 N.W.2d 459 (1974).

The public retains the right to travel, by watercraft, on waters that are in their natural condition, capable of such use, without the riparian owners' consent. Bauman v. Woodlake Partners, LLC, 199 N.C. App. 441, 681 S.E.2d 819 (2009).

Riparian rights are generally discussed in §§ 33 to 54.

2 Idaho Northern R. Co. v. Post Falls Lumber & Mfg. Co., 20 Idaho 695, 119 P. 1098 (1911); McCauley v. Salmon, 234 Iowa 1020, 14 N.W.2d 715 (1944); Boutwell v. Champlain Realty Co., 89 Vt. 80, 94 A. 108 (1915); Mitchell v. Lea Lumber Co., 43 Wash. 195, 86 P. 405 (1906).

3 Britton v. Department of Conservation, 2009 ME 60, 974 A.2d 303 (Me. 2009), as revised, (July 9, 2009).

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§ 167. Use of shore for purposes of navigation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2588, 2592, 2639

As a general rule, the public right of navigation does not include, as incidental to it, the use of shore lands held in private ownership.[1] The absolute rights of persons in the use of a navigable stream for the purpose of navigation do not extend to the appropriation of the soil, trees, and vegetation on its banks, either permanently or temporarily, to their own use; such an appropriation is a taking of private property requiring compensation to the owner.[2] The right of navigation does not give a license to go upon the riparian owner's lands and erect structures, or to traverse the riparian premises.[3] Similarly, those navigating a river do not have the right, as incident to the right of navigation, to land on and use the bank at a place other than a public landing without the owner's consent.[4]

Footnotes

1 Gaither v. Albemarle Hospital, 235 N.C. 431, 70 S.E.2d 680 (1952); State v. Black Bros., 116 Tex. 615, 297 S.W. 213, 53 A.L.R. 1181 (1927).

2 City of Peoria v. Central Nat. Bank, 224 Ill. 43, 79 N.E. 296 (1906); Smith v. Atkins, 110 Ky. 119, 22 Ky. L. Rptr. 1619, 60 S.W. 930 (1901); Watkins v. Dorris, 24 Wash. 636, 64 P. 840 (1901).

3 Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 P. 532 (1907); Mashburn v. St. Joe Improvement Co., 19 Idaho 30, 113 P. 92 (1910); La Veine v. Stack-Gibbs Lumber Co., 17 Idaho 51, 104 P. 666 (1909).

4 City of Peoria v. Central Nat. Bank, 224 Ill. 43, 79 N.E. 296 (1906); Gaither v. Albemarle Hospital, 235 N.C. 431, 70 S.E.2d 680 (1952).

Riparian owners were entitled to a preliminary injunction prohibiting a barge company from mooring or docking its boats and barges on the owners' property, even though the owners allegedly failed to prove that the company would likely trespass on their property in the future, and a showing of irreparable harm was not required. Rome v. Ingram Barge Co., 927 So. 2d 1185 (La. Ct. App. 5th Cir. 2006), writ denied, 929 So. 2d 1269 (La. 2006).

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§ 168. Waters improved, changed, or made navigable by riparian owner

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West's Key Number Digest

West's Key Number Digest, Water Law 2588

The proprietor of a nonnavigable stream neither loses any of one's own rights in the stream nor subjects it to any public servitude by rendering it navigable by artificial means.[1] Thus, where a dam has been placed in a nonnavigable watercourse, thereby rendering it navigable, and the right so to maintain it has been acquired by prescription, the owners of lands abutting on the stream have the right to insist that it be continued in its navigable state.[2]

Footnotes

1 Sneed v. Weber, 307 S.W.2d 681 (Mo. Ct. App. 1957).

2 Kray v. Muggli, 84 Minn. 90, 86 N.W. 882 (1901).

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§ 169. Riparian owner's access to water

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2585, 2588

Ownership of land bordering on a navigable stream or body of water, either tidal or nontidal,[1] generally carries with it, as incidental to it, the right of access from that land to the navigable water.[2] This right of the riparian or littoral proprietor is distinguished from that individual members of the general public enjoy.[3] It is a property right[4] analogous to an abutting owner's right of access to a highway on land[5] and is more than the common or public right of access to the waterfront from public grounds or over a public approach.[6]

The riparian or littoral owner's right of access is subject to the paramount public right of navigation and the public regulation of navigation.[7]

Footnotes

1 Burns v. Forbes, 412 F.2d 995 (3d Cir. 1969); Barnes v. Midland R. Terminal Co., 193 N.Y. 378, 85 N.E. 1093 (1908); Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., 250 Or. 612, 443 P.2d 205 (1968); McCarthy v. Coos Head Timber Co., 208 Or. 371, 302 P.2d 238 (1956).

2 U.S. v. River Rouge Improvement Co., 269 U.S. 411, 46 S. Ct. 144, 70 L. Ed. 339 (1926); Burns v. Forbes, 412 F.2d 995 (3d Cir. 1969); Colberg, Inc. v. State ex rel. Dept. of Public Works, 67 Cal. 2d 408, 62 Cal. Rptr. 401, 432 P.2d 3 (1967); Town of Orange v. Resnick, 94 Conn. 573, 109 A. 864, 10 A.L.R. 1046 (1920); Freed v. Miami Beach Pier Corporation, 93 Fla. 888, 112 So. 841, 52 A.L.R. 1177 (1927); Driesbach v.

Lynch, 71 Idaho 501, 234 P.2d 446 (1951); McCormick v. Chicago Yacht Club, 331 Ill. 514, 163 N.E. 418, 60 A.L.R. 763 (1928); Hilt v. Weber, 252 Mich. 198, 233 N.W. 159, 71 A.L.R. 1238 (1930); Tiffany v. Town of Oyster Bay, 234 N.Y. 15, 136 N.E. 224, 24 A.L.R. 1267 (1922); Gaither v. Albemarle Hospital, 235 N.C. 431, 70 S.E.2d 680 (1952); Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., 250 Or. 612, 443 P.2d 205 (1968); McDaniel v. Greenville-Carolina Power Co., 95 S.C. 268, 78 S.E. 980, 6 A.L.R. 1321 (1913); Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821, 112 A.L.R. 1104 (1937); Cordovana v. Vipond, 198 Va. 353, 94 S.E.2d 295, 65 A.L.R.2d 138 (1956).

3 Colberg, Inc. v. State ex rel. Dept. of Public Works, 67 Cal. 2d 408, 62 Cal. Rptr. 401, 432 P.2d 3 (1967); State v. Knowles-Lombard Co., 122 Conn. 263, 188 A. 275, 107 A.L.R. 1344 (1936); Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., 250 Or. 612, 443 P.2d 205 (1968).

As to the rights of members of the general public, see § 160.

4 U.S. v. River Rouge Improvement Co., 269 U.S. 411, 46 S. Ct. 144, 70 L. Ed. 339 (1926); San Francisco Sav. Union v. R.G.R. Petroleum & Mining Co., 144 Cal. 134, 77 P. 823 (1904); Town of Orange v. Resnick, 94 Conn. 573, 109 A. 864, 10 A.L.R. 1046 (1920); Cobb v. Lincoln Park Com'rs, 202 Ill. 427, 67 N.E. 5 (1903); Hilt v. Weber, 252 Mich. 198, 233 N.W. 159, 71 A.L.R. 1238 (1930); Tiffany v. Town of Oyster Bay, 234 N.Y. 15, 136 N.E. 224, 24 A.L.R. 1267 (1922); Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., 250 Or. 612, 443 P.2d 205 (1968); Northern Pac. Ry. Co. v. S.E. Slade Lumber Co., 61 Wash. 195, 112 P. 240 (1910); Doemel v. Jantz, 180 Wis. 225, 193 N.W. 393, 31 A.L.R. 969 (1923).

5 Town of Orange v. Resnick, 94 Conn. 573, 109 A. 864, 10 A.L.R. 1046 (1920); Home for Aged Women v. Commonwealth, 202 Mass. 422, 89 N.E. 124 (1909); Gaither v. Albemarle Hospital, 235 N.C. 431, 70 S.E.2d 680 (1952); Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., 250 Or. 612, 443 P.2d 205 (1968).

6 Town of Orange v. Resnick, 94 Conn. 573, 109 A. 864, 10 A.L.R. 1046 (1920); Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., 250 Or. 612, 443 P.2d 205 (1968).

7 Greenleaf-Johnson Lumber Co. v. Garrison, 237 U.S. 251, 35 S. Ct. 551, 59 L. Ed. 939 (1915); City of Oakland v. E.K. Wood Lumber Co., 211 Cal. 16, 292 P. 1076, 80 A.L.R. 379 (1930); Home for Aged Women v. Commonwealth, 202 Mass. 422, 89 N.E. 124 (1909); Lewis Blue Point Oyster Cultivation Co. v. Briggs, 198 N.Y. 287, 91 N.E. 846 (1910), aff'd, 229 U.S. 82, 33 S. Ct. 679, 57 L. Ed. 1083 (1913); State v. Cleveland & P. R. Co., 94 Ohio St. 61, 113 N.E. 677 (1916); State ex rel. Wausau St. Ry. Co. v. Bancroft, 148 Wis. 124, 134 N.W. 330 (1912).

While state law may give a riparian owner valuable rights of access to navigable waters good against other riparian owners or against the state itself, these rights are not assertable against the superior rights of the United States, are not property within the meaning of the Fifth Amendment, and compensation need not be paid when appropriated by the United States, since special values arising from access to a navigable stream are allocable to the public and not to a private interest. U.S. v. Rands, 389 U.S. 121, 88 S. Ct. 265, 19 L. Ed. 2d 329 (1967).

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4. Use; Public and Riparian Rights

b. Relationship Between Navigational and Riparian Rights

§ 170. Riparian owner's access to water—Interference with access

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2585, 2588

The riparian or littoral proprietor's access or right of access to navigable waters may not lawfully be impaired by unauthorized uses of the shore for private purposes,[1] and one who wrongfully interferes with such access may be held liable for the resulting damage.[2] Wrongful interference with the right of access to navigable waters constitutes a nuisance.[3]

The riparian or littoral proprietor's right of access attaches equally to every part of the proprietor's shoreline, and no one has the right to fetter or impair the owner's enjoyment of the property by compelling the owner to go on the water only at certain points.[4]

Footnotes

1 Tiffany v. Town of Oyster Bay, 234 N.Y. 15, 136 N.E. 224, 24 A.L.R. 1267 (1922).

2 Thiesen v. Gulf, F. & A. Ry. Co., 75 Fla. 28, 78 So. 491 (1917).

3 San Francisco Sav. Union v. R.G.R. Petroleum & Mining Co., 144 Cal. 134, 77 P. 823 (1904); Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 57 Fla. 399, 48 So. 643 (1909); Smart v. Aroostook Lumber Co., 103 Me. 37, 68 A. 527 (1907); Reyburn v. Sawyer, 135 N.C. 328, 47 S.E. 761 (1904); Johnson v. Jeldness, 85 Or. 657, 167 P. 798 (1917); Hulet v. Wishkah Boom Co., 54 Wash. 510, 103 P. 814 (1909).

4 Hilt v. Weber, 252 Mich. 198, 233 N.W. 159, 71 A.L.R. 1238 (1930); Johnson v. Jeldness, 85 Or. 657, 167 P. 798 (1917); Hollan v. State, 308 S.W.2d 122 (Tex. Civ. App. Fort Worth 1957), writ refused n.r.e.

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§ 171. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2600

Forms

Am. Jur. Pleading and Practice Forms, Waters § 106 (Answer—Defense—Obstruction not "structure" under statutory provision)

Navigable waters constitute public highways,[1] and any unauthorized and unreasonable obstruction of them, or of navigation on them, is unlawful.[2] The right to navigate is paramount, and those who place objects in, under, or over a waterway must do so in a way that does not interfere with navigation, including navigation outside a dredged channel.[3] Generally, all material obstructions to navigation not authorized by the proper government authority are public nuisances.[4] It is not necessary that obstructions in the way of navigation actually interfere with navigation to render them nuisances; it is sufficient if navigation is thereby rendered less convenient, secure, and expeditious.[5] The fact that the obstruction may be a source of public benefit does not relieve it of its character as a nuisance.[6]

Footnotes

1 § 163.

2 Cumberland Pipe Line Co. v. Stambaugh, 137 Ky. 528, 126 S.W. 106 (1910); Pharr v. Morgan's L. & T.R. & S.S. Co., 115 La. 138, 38 So. 943 (1905); Smart v. Aroostook Lumber Co., 103 Me. 37, 68 A. 527 (1907); Gaither v. Albemarle Hospital, 235 N.C. 431, 70 S.E.2d 680 (1952).

3 Pennzoil Producing Co. v. Offshore Exp., Inc., 943 F.2d 1465 (5th Cir. 1991).

4 West Chicago St. R. Co. v. People of State of Illinois ex rel. City of Chicago, 201 U.S. 506, 26 S. Ct. 518, 50 L. Ed. 845 (1906); David M. Swain & Son v. Chicago, B. & Q.R. Co., 252 Ill. 622, 97 N.E. 247 (1911); Ireland v. Bowman & Cockrell, 130 Ky. 153, 113 S.W. 56 (1908); Inhabitants of Marion v. Tuell, 111 Me. 566, 90 A. 484 (1914); Lepire v. Klenk, 169 Mich. 243, 134 N.W. 1119 (1912); Viebahn v. Board of Com'rs of Crow Wing County, 96 Minn. 276, 104 N.W. 1089 (1905); State v. Hutchins, 79 N.H. 132, 105 A. 519, 2 A.L.R. 1685 (1919); Gaither v. Albemarle Hospital, 235 N.C. 431, 70 S.E.2d 680 (1952); State v. Columbia Water Power Co., 82 S.C. 181, 63 S.E. 884 (1909); Charnley v. Shawano Water-Power & River-Improvement Co., 109 Wis. 563, 85 N.W. 507 (1901).

5 Gaither v. Albemarle Hospital, 235 N.C. 431, 70 S.E.2d 680 (1952).

6 Gaither v. Albemarle Hospital, 235 N.C. 431, 70 S.E.2d 680 (1952).

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§ 172. Government regulation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2600

The federal government is charged with insuring that navigable waterways, like any other routes of commerce over which it has assumed control, remain free of obstruction,[1] and Congress clearly has the power to pass laws for the regulation and prevention of obstructions to the navigation of such waters.[2] This power is an incident to its power to regulate commerce, and the United States may control all structures and works that interfere in any manner with the navigable capacity of the navigable waters of the United States, which either of themselves or in connection with other waters form channels for interstate commerce.[3]

The Rivers and Harbors Act prohibits construction of bridges, causeways, dams, or dikes over navigable waters without obtaining the consent of Congress and obtaining approval of the plans for a bridge or causeway by the Secretary of Transportation, or a dam or dike by the Army Corps of Engineers.[4] Structures may be built across navigable waters lying wholly within a single state pursuant to the state legislature's authority, but federal agency approval is still necessary.[5] The creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is prohibited.[6]

Observation:

The Rivers and Harbors Act of 1899, an assertion of the sovereign power of the United States, is intended to prevent obstructions in the nation's waterways; despite some difficulties with the wording of the Act, the Supreme Court of the United States has consistently found its coverage to be broad and that a principal beneficiary of the Act, if not the principal beneficiary, is the government itself.[7]

Most states, by statute, guard the rights of the public in their navigable waters, and interference with navigation is permitted only in exceptional cases and within carefully defined restrictions.[8] Under the public trust doctrine,[9] the public has a right to unobstructed navigability of waters in their natural state; however, for the purpose of some state laws, it is not whether the waterway itself is natural or artificial but that water that is navigable in its natural state should flow without diminution or obstruction.[10]

CUMULATIVE SUPPLEMENT

Statutes:

33 U.S.C.A. § 401 was revised effective February 8, 2016, by striking "Secretary of Transportation" and inserting "Secretary of the department in which the Coast Guard is operating."

[END OF SUPPLEMENT]

Footnotes

1 Wyandotte Transp. Co. v. U.S., 389 U.S. 191, 88 S. Ct. 379, 19 L. Ed. 2d 407 (1967).

2 U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940).

3 Jackson v. U.S., 230 U.S. 1, 33 S. Ct. 1011, 57 L. Ed. 1363 (1913); President, Managers & Co of Monongahela Bridge Co v. U S, 216 U.S. 177, 30 S. Ct. 356, 54 L. Ed. 435 (1910); Union Bridge Co. v. U S, 204 U.S. 364, 27 S. Ct. 367, 51 L. Ed. 523 (1907).

4 33 U.S.C.A. § 401.

5 33 U.S.C.A. § 401.

6 33 U.S.C.A. § 403.
Under the Rivers and Harbors Act, no one may place obstructions into the navigable waters of the United States without authorization from the Army Corps of Engineers. U.S. v. San Juan Bay Marina, 239 F.3d 400, 49 Fed. R. Serv. 3d 336 (1st Cir. 2001).
As to criminal prosecutions, see § 188.

7 Wyandotte Transp. Co. v. U.S., 389 U.S. 191, 88 S. Ct. 379, 19 L. Ed. 2d 407 (1967).

8 Minnesota Canal & Power Co. v. Pratt, 101 Minn. 197, 112 N.W. 395 (1907).
As to authorization of obstructions, see § 174.

9 § 161.

10 Fish House, Inc. v. Clarke, 204 N.C. App. 130, 693 S.E.2d 208 (2010).

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§ 173. Government regulation—Federal or state authority

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2600

The power of Congress with respect to the obstruction of navigable waters or navigation on them is exclusive.[1] Where Congress acts, and to the extent of that action, the jurisdiction of the state government recedes. If Congress declares a structure over or on navigable waters to be unlawful, the state legislature may not make it lawful, nor may a state court declare it to be lawful. Conversely, if Congress declares the structure to be lawful, neither the state legislature nor the state court may, even on the most plenary proof, declare it unlawful as interfering with navigation. The judgment of Congress is conclusive, not to be questioned by any court.[2]

A specific statement in an act of Congress authorizing the construction of a dam that it shall be used first for river regulation, improvement of navigation, and flood control governs a statement in that act that the authority conferred shall be subject to a certain compact between states, which compact makes improvement of navigation subservient to other purposes.[3]

Footnotes

1 State of Wisconsin v. State of Illinois, 278 U.S. 367, 49 S. Ct. 163, 73 L. Ed. 426 (1929); Sanitary Dist. of Chicago v. U.S., 266 U.S. 405, 45 S. Ct. 176, 69 L. Ed. 352 (1925).
As to federal authority with respect to regulation of navigable waters, generally, see § 151.

2 U.S. v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 33 S. Ct. 667, 57 L. Ed. 1063 (1913).

3 State of Arizona v. State of California, 283 U.S. 423, 51 S. Ct. 522, 75 L. Ed. 1154 (1931).

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§ 174. Obstruction or interference pursuant to public authority

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2600, 2603, 2613, 2618

A.L.R. Library

Liability for overflow of water confined or diverted for public power purposes, 91 A.L.R.3d 1065

In the exercise by the State of its sovereign power to regulate navigable waters,[1] subject to the paramount authority of the federal government with respect to navigable waters of the United States,[2] navigation may be impeded or obstructed if, in the judgment of the controlling state authority, the public good requires it.[3] Thus, in the absence of conflicting legislation by Congress, a state may erect or authorize the erection of various structures that constitute obstructions to navigation, including dams, booms, and other instrumentalities in aid of navigation or for other proper purposes.[4]

The federal government has plenary power to exclude structures from the navigable waters of the United States and may impose terms and conditions on granting a license to erect such structures.[5]

Obstructions that are authorized by competent governmental authority are not nuisances,[6] and recovery is not allowed for loss or inconvenience incidentally resulting from them, in the absence of a statute,[7] unless the case falls within the operation of constitutional restrictions on the taking or damaging of private property without the payment of compensation.[8]

Footnotes

1 § 153.

2 § 151.

3 Manigault v. Springs, 199 U.S. 473, 26 S. Ct. 127, 50 L. Ed. 274 (1905); Home for Aged Women v. Commonwealth, 202 Mass. 422, 89 N.E. 124 (1909); State v. Sunapee Dam Co., 70 N.H. 458, 50 A. 108 (1901); Southern R. Co. v. Ferguson, 105 Tenn. 552, 59 S.W. 343 (1900).

4 Manigault v. Springs, 199 U.S. 473, 26 S. Ct. 127, 50 L. Ed. 274 (1905); U.S. v. Bellingham Bay Boom Co., 176 U.S. 211, 20 S. Ct. 343, 44 L. Ed. 437 (1900).

A state statute authorizing permanent bridges over a state-administered river was not preempted by the Federal Wild and Scenic Rivers Act (16 U.S.C.A. § 1273(a)(ii)), in light of the clear text of the WSRA recognizing a state's authority over state-administered wild rivers, and both the National Park Service and the Army Corps of Engineers approved the state's plans for one of the permanent bridges. Fitzgerald v. Harris, 549 F.3d 46 (1st Cir. 2008).

As to wharves, see Am. Jur. 2d, Wharves § 18.

5 U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940).

6 Rainey v. Red River, T. & S. Ry. Co., 99 Tex. 276, 90 S.W. 1096 (1906).

7 Southern Pac. Co. v. Olympian Dredging Co., 260 U.S. 205, 43 S. Ct. 26, 67 L. Ed. 213 (1922).

8 Am. Jur. 2d, Eminent Domain §§ 181 et seq.

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§ 175. Obstruction or interference pursuant to public authority—Necessity for and form of authorization

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2600, 2603, 2613, 2618

The right to obstruct navigation must ordinarily be explicitly granted and may not rest on implication[1] or presumption.[2] A general statute authorizing the erection of dams will not justify interference with navigable waters.[3]

The provision of the Rivers and Harbors Act prohibiting obstructions, unless affirmatively authorized by Congress,[4] makes state authorization alone inadequate but does not override state regulations on the subject.[5] However, where a particular project or structure is authorized by a special act of Congress, compliance with state requirements with regard to authorization is unnecessary.[6] The requirement of authorization by Congress[7] does not require a special authorization in every case but leaves to the Secretary of the Army, acting on the recommendation of the Chief of Engineers, the determination of what should be approved and authorized in the classes of cases described in the Rivers and Harbors Act.[8] The Army Corps of Engineers has discretion to determine what, in the particular case, constitutes an unreasonable obstruction.[9] Whether structures interfere with navigation, so as to require a permit under the Army Corps of Engineers' regulation, should be evaluated at the present time, not at the time the structure was built.[10] The authority of the Secretary of the Army is not confined solely to considerations of navigation in deciding whether to issue a permit for the creation of an obstruction to navigation.[11] Regulations specifying public interest factors to be considered by the Secretary of the Army in determining whether to issue a permit for the construction of an obstruction to navigation are valid even though they authorize the Secretary to consider a wider range of factors than the effects of the project on navigability.[12] The action of the Secretary of the Army in conditioning a permit for the construction

of an obstruction to navigation on a state's disclaimer of rights to additional submerged lands that could be claimed as a result of the construction is consistent with governing regulations.[13]

Observation:

The operators of commercial establishments located on piers in a navigable harbor, who illegally build new piers after their permit application under the Act is denied, and who do not seek review of the denial of permits, are foreclosed from collaterally attacking the denial of the permits in an action brought by the United States to enforce the Act and to compel the removal of the unlawfully built piers.[14]

A state administrative decision denying an application for the construction of a dam on a river is not arbitrary or capricious where the rationale was the preservation of an undamaged stream bed and the use of the river for sports, fishing, and white water canoeing.[15] Some state permit statutes apply only to dams exceeding a specified impoundment capacity, and a dam that is exempt from the permit requirement is not subject to a requirement that its design include a passthrough device.[16]

CUMULATIVE SUPPLEMENT

Cases:

If the Coast Guard has deemed certain terms and conditions necessary for a proposed wind farm project pursuant to the Coast Guard and Maritime Transportation Act of 2006 section providing that the Commandant is responsible for deciding what is necessary to prevent a negative impact to navigation, aviation, and communications, then the court is obligated to sustain those terms and conditions if they are reasonably related to the Coast Guard's goal, otherwise consistent with the Outer Continental Shelf Lands Act, and supported by substantial evidence. Outer Continental Shelf Lands Act § 2, 43 U.S.C.A. § 1331; Pub.L. No. 109–241. Public Employees for Environmental Responsibility v. Beaudreau, 25 F. Supp. 3d 67 (D.D.C. 2014).

Rivers and Harbors Act prohibits entities, including the Army Corps of Engineers and other federal agencies, from placing barriers in canals and navigable rivers, such as the Chicago Area Waterway System (CAWS), without congressional approval. 33 U.S.C.A. § 401. Michigan v. U.S. Army Corps of Engineers, 911 F. Supp. 2d 739 (N.D. Ill. 2012).

[END OF SUPPLEMENT]

Footnotes

1 Northern Pac. Ry. Co. v. U.S., 104 F. 691 (C.C.A. 8th Cir. 1900).

2 State v. Hutchins, 79 N.H. 132, 105 A. 519, 2 A.L.R. 1685 (1919).

3 Minnesota Canal & Power Co. v. Pratt, 101 Minn. 197, 112 N.W. 395 (1907).

4 33 U.S.C.A. § 403.

5 State of Wisconsin v. State of Illinois, 278 U.S. 367, 49 S. Ct. 163, 73 L. Ed. 426 (1929); North Shore Boom & Driving Co v. Nicomen Boom Co, 212 U.S. 406, 29 S. Ct. 355, 53 L. Ed. 574 (1909); Cummings v. City of Chicago, 188 U.S. 410, 23 S. Ct. 472, 47 L. Ed. 525 (1903).

6 State of Arizona v. State of California, 283 U.S. 423, 51 S. Ct. 522, 75 L. Ed. 1154 (1931).

7 33 U.S.C.A. § 401.

8 State of Wisconsin v. State of Illinois, 278 U.S. 367, 49 S. Ct. 163, 73 L. Ed. 426 (1929).

9 U.S. v. Milner, 583 F.3d 1174 (9th Cir. 2009).

10 U.S. v. Sasser, 967 F.2d 993 (4th Cir. 1992).

11 U.S. v. Alaska, 503 U.S. 569, 112 S. Ct. 1606, 118 L. Ed. 2d 222 (1992).

12 U.S. v. Alaska, 503 U.S. 569, 112 S. Ct. 1606, 118 L. Ed. 2d 222 (1992).

13 U.S. v. Alaska, 503 U.S. 569, 112 S. Ct. 1606, 118 L. Ed. 2d 222 (1992).

14 U.S. v. San Juan Bay Marina, 239 F.3d 400, 49 Fed. R. Serv. 3d 336 (1st Cir. 2001).
As to enforcement of the Act by injunction, see § 185.

15 Application of Hemco, Inc., 129 Vt. 534, 283 A.2d 246 (1971) (denial by Water Resources Board).

16 Koch v. Aupperle, 274 Neb. 52, 737 N.W.2d 869 (2007).

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§ 176. Prescriptive rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2600

The obstruction of a river that is navigable, and therefore a public highway, is not justified on the ground of prescriptive right.[1] An unauthorized obstruction in a navigable stream is not made legal by any lapse of time.[2] Exercise of the right of the State to regulate navigation of a river includes control of the river and, as against this sovereign right and responsibility, a dam operator may never acquire any prescriptive right as would interfere with the State's authority.[3]

Footnotes

1 Blackman v. Mauldin, 164 Ala. 337, 51 So. 23 (1909); Lenoir County v. Crabtree, 158 N.C. 357, 74 S.E. 105 (1912); Town of Shelby v. Cleveland Mill & Power Co., 155 N.C. 196, 71 S.E. 218 (1911); Charnley v. Shawano Water-Power & River-Improvement Co., 109 Wis. 563, 85 N.W. 507 (1901).

2 Beidler v. Sanitary Dist. of Chicago, 211 Ill. 628, 71 N.E. 1118 (1904).

3 People v. System Properties, Inc., 2 N.Y.2d 330, 160 N.Y.S.2d 859, 141 N.E.2d 429 (1957).

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§ 177. Character and extent of obstruction or interference

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2600

The Rivers and Harbors Act prohibits the creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States.[1] This statute is not a prohibition of any obstruction to navigation, but of any obstruction to navigable capacity, and anything within the limits of the jurisdiction of the United States that tends to destroy the navigable capacity of one of the navigable waters of the United States is within the terms of the prohibition.[2]

Footnotes

1 33 U.S.C.A. § 403.

2 U.S. v. Republic Steel Corp., 362 U.S. 482, 80 S. Ct. 884, 4 L. Ed. 2d 903 (1960).
"Houseboats" that are found to be "permanent mooring structures" within the Army Corps of Engineers regulation may be outlawed as within the term "other structures" presumed to constitute obstructions under the Rivers and Harbors Act. U.S. v. Members of Estate of Boothby, 16 F.3d 19 (1st Cir. 1994).

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§ 178. Character and extent of obstruction or interference—Bridges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2601 to 2610

A bridge across a navigable stream is not necessarily a nuisance or an unlawful obstruction even though it may impede or interfere with navigation on the river; such interference, within reasonable limits, is tolerated because of necessity and convenience to commerce on land.[1] On the other hand, a bridge spanning a navigable river must be so maintained and operated that navigation may not be impeded more than is absolutely necessary, the right of navigation being paramount.[2] The reasonableness of the obstruction of navigation by a bridge is a question of fact.[3]

The character of a bridge as an obstruction may depend on whether it has been constructed and maintained in accordance with proper public authorization.[4]

A bridge may not, at any time, unreasonably obstruct the free navigation of any navigable waters of the United States.[5] It is unlawful for a bridge over navigable waters to deviate from the plans and specification for its construction as approved by the Army Corps of Engineers unless the modification of the bridge is previously submitted to and approved by the Secretary of Transportation.[6]

CUMULATIVE SUPPLEMENT

Statutes:

33 U.S.C.A. § 491 was revised effective February 8, 2016, by striking "Secretary of Transportation" and inserting "Secretary of the department in which the Coast Guard is operating."

[END OF SUPPLEMENT]

Footnotes

1 The Mohler, 88 U.S. 230, 22 L. Ed. 485, 1874 WL 17413 (1874); Pharr v. Morgan's L. & T.R. & S.S. Co., 115 La. 138, 38 So. 943 (1905).

2 City of Chicago v. Chicago Transp. Co., 222 F. 238 (C.C.A. 7th Cir. 1915).

3 Idaho Northern R. Co. v. Post Falls Lumber & Mfg. Co., 20 Idaho 695, 119 P. 1098 (1911).

4 Tuell v. Inhabitants of Marion, 110 Me. 460, 86 A. 980 (1913).

5 33 U.S.C.A. § 512.

6 33 U.S.C.A. § 491.
As to the construction of bridges, generally, see Am. Jur. 2d, Highways, Streets, and Bridges §§ 92 et seq.

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§ 179. Character and extent of obstruction or interference—Debris and refuse

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2626

The term "obstruction" as used in § 10 of the Rivers and Harbors Act[1] is not limited to some kind of structure,[2] and the deposit of solids affecting the navigable capacity of a stream is the creation of an obstruction within the Act.[3] The term also includes the deposit of certain refuse and waste materials, which violators may be ordered to remove.[4]

In addition, § 13 of the River and Harbors Act makes it unlawful to deposit material of any kind in any place on the bank of any navigable water where the deposit is liable to wash into the navigable water, either by ordinary or high tides, by storms or floods, or otherwise, by which navigation may be impeded or obstructed.[5] Another portion of the Act provides that in places where harbor lines have not been established, and where deposits of debris of mines or stamp works can be made without injury to navigation, within lines to be established by the Secretary of the Army, the Secretary is authorized to cause such lines to be established; within such lines such deposits may be made, under regulations prescribed by the Secretary.[6]

Footnotes

1 33 U.S.C.A. § 403.

2 U.S. v. Republic Steel Corp., 362 U.S. 482, 80 S. Ct. 884, 4 L. Ed. 2d 903 (1960).

3 U.S. v. Republic Steel Corp., 362 U.S. 482, 80 S. Ct. 884, 4 L. Ed. 2d 903 (1960); U.S. v. Perma Paving Co., 332 F.2d 754 (2d Cir. 1964).

4 U.S. v. San Juan Bay Marina, 239 F.3d 400, 49 Fed. R. Serv. 3d 336 (1st Cir. 2001).

5 33 U.S.C.A. § 407.

6 33 U.S.C.A. § 407a.

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§ 180. Character and extent of obstruction or interference—Sunken vessels

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2625

Forms

Am. Jur. Pleading and Practice Forms, Waters § 100 (Complaint in Federal Court—Against United States—Allegation—Failure to mark abandoned wreck in navigable waters)

The negligent sinking of a vessel falls within the prohibition of § 15 of the Rivers and Harbors Act,[1] prohibiting sinking, or permitting or causing to be sunk, vessels or other craft in navigable channels.[2] A vessel sunk in a navigable channel must be immediately marked with a buoy or beacon by day, and a light by night.[3]

Observation:

The statute described above, also known as The Wreck Act,[4] addresses the problem of obstructions caused by sunken vessels. Congress's purpose in enacting that statute was the protection of other vessels plying the same waters as the sunken vessels.[5]

The owner is liable for any injury resulting from a failure to comply with the statute with reasonable promptness.[6] The fact that a local government agency was unsuccessful in its attempt to remove a sunken boat from a river bottom, after entering into hold-harmless agreement with the boat's owner, does not preclude the agency's status as a potentially liable "operator" under the Act since the issue is whether the agreement with the owner constituted a towage contract.[7]

The Rivers and Harbors Act[8] does not embody any nonstatutory rule to the effect that a shipowner who has negligently sunk a vessel may abandon it and be insulated from all but in rem liability.[9] Having properly chosen to remove a vessel negligently sunk in a navigable channel when the owner was unwilling to do so itself, the United States does not lose the right to place responsibility for the removal on those who negligently sank the vessel.[10]

Footnotes

1 33 U.S.C.A. § 409.

2 Wyandotte Transp. Co. v. U.S., 389 U.S. 191, 88 S. Ct. 379, 19 L. Ed. 2d 407 (1967).

3 33 U.S.C.A. § 409.

4 33 U.S.C.A. §§ 409 et seq.

5 Danos Marine Inc. v. Certain Primary Protection and Indem. Underwriters, 613 F.3d 479 (5th Cir. 2010).

6 The Anna M. Fahy, 153 F. 866 (C.C.A. 2d Cir. 1907).

7 Fuesting v. Lafayette Parish Bayou Vermilion Dist., 470 F.3d 576 (5th Cir. 2006).
Towage is generally discussed in Am. Jur. 2d, Shipping §§ 709 et seq.

8 33 U.S.C.A. §§ 401 et seq.

9 Wyandotte Transp. Co. v. U.S., 389 U.S. 191, 88 S. Ct. 379, 19 L. Ed. 2d 407 (1967).

10 Wyandotte Transp. Co. v. U.S., 389 U.S. 191, 88 S. Ct. 379, 19 L. Ed. 2d 407 (1967).

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§ 181. Removal or alteration of obstructions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2600, 2607

In accordance with the general rule regarding obstructions in navigable waters, a prescriptive or other right may not be allowed to interfere with the exercise by the public of the police power so as to require removal or alteration of a bridge when, by changing conditions, it may become an obstruction to navigation.[1] Uncompensated obedience is required where bridges are ordered removed or altered because they obstruct navigation, and this is the rule even though the bridges were lawful structures when erected.[2] A bridge, although erected under the sanction of a state, and although not an illegal structure or an unreasonable obstruction to navigation in the condition of commerce and navigation at the time of its erection, must be taken as having been constructed with knowledge of the paramount power of Congress and subject to the possibility that Congress might, at some time after its construction, exert its constitutional power, and the mere silence of Congress does not impose a constitutional obligation on the United States to make compensation for subsequent required alterations.[3] The owners of wharves conforming to a harbor line previously established are not entitled to compensation where the demolition of a portion of the structures is required by the establishment of a new harbor line.[4]

Although the Rivers and Harbors Act[5] does not explicitly mention the maintenance of structures in navigable waters, in the sense of keeping structures in place, it has been interpreted as making unlawful the failure to remove structures prohibited by it even if the structures were previously legal.[6] However, a grandfather clause in a regulation implementing the Act[7] has the result that a structure completed before December 18, 1968, that does not interfere with navigation does not violate the Act even in the absence of a permit.[8]

It is competent for the State to impose on a municipality or other subdivision the duty of keeping the navigable waters within its borders open and free from obstructions.[9]

Footnotes

1 People ex rel. Hayne v. Metropolitan West Side Elevated Ry. Co., 285 Ill. 246, 120 N.E. 748 (1918).
As to there not being a prescriptive right to maintain an obstruction, see § 176.

2 Hannibal Bridge Co v. U S, 221 U.S. 194, 31 S. Ct. 603, 55 L. Ed. 699 (1911); President, Managers & Co of Monongahela Bridge Co v. U S, 216 U.S. 177, 30 S. Ct. 356, 54 L. Ed. 435 (1910); Union Bridge Co. v. U S, 204 U.S. 364, 27 S. Ct. 367, 51 L. Ed. 523 (1907).

3 President, Managers & Co of Monongahela Bridge Co v. U S, 216 U.S. 177, 30 S. Ct. 356, 54 L. Ed. 435 (1910).

4 Greenleaf-Johnson Lumber Co. v. Garrison, 237 U.S. 251, 35 S. Ct. 551, 59 L. Ed. 939 (1915).

5 33 U.S.C.A. §§ 401 et seq.

6 U.S. v. Milner, 583 F.3d 1174 (9th Cir. 2009) (shore defense structures).
As to an injunction against maintaining the obstruction, see § 185, and summary abatement, see § 186.

7 33 C.F.R. § 330.3(b).

8 Bunge Corp. v. Freeport Marine Repair, Inc., 240 F.3d 919 (11th Cir. 2001) (grain loading facility).

9 O'Donnell v. City of Syracuse, 184 N.Y. 1, 76 N.E. 738 (1906); Kitsap County Transp. Co., Inc. v. City of Seattle, 75 Wash. 673, 135 P. 476 (1913).

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§ 182. Action by private person; necessity for and existence of special injury

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2629

A private person has a cause of action for relief from injury caused by an obstruction in a navigable water only if, by reason of that obstruction, the person suffers some special injury different from that of the public generally and proves special damages resulting from the public nuisance.[1] As a general rule, the State is the sole party allowed to seek public remedies for alleged harm to public waters.[2] However, while the wrong must be special, as distinguished from a grievance common to the whole public, which has the right to use the navigable water as a highway,[3] the common misfortune of a number, or even a class, of persons may give each a right of redress.[4]

Mere interference with the right of one who wishes to use the water for purposes of navigation together with the general public as a common highway does not give a right of action.[5]

Footnotes

1 Hamilton v. Vicksburg, S. & P. R. Co., 119 U.S. 280, 7 S. Ct. 206, 30 L. Ed. 393 (1886); Cole v. Austin, 107 Conn. 252, 140 A. 108 (1928); Bertram v. State Road Dept., 118 So. 2d 674 (Fla. 3d DCA 1960); Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 57 Fla. 399, 48 So. 643 (1909); David M. Swain & Son v. Chicago, B. & Q.R. Co., 252 Ill. 622, 97 N.E. 247 (1911); Smart v. Aroostook Lumber Co., 103 Me. 37, 68 A. 527 (1907); Home for Aged Women v. Commonwealth, 202 Mass. 422, 89

N.E. 124 (1909); Lepire v. Klenk, 169 Mich. 243, 134 N.W. 1119 (1912); McMeekin v. Central Carolina Power Co., 80 S.C. 512, 61 S.E. 1020 (1908); Hulet v. Wishkah Boom Co., 54 Wash. 510, 103 P. 814 (1909). As to the general requirement that a private party suffer special damages to have a right of action for relief from a public nuisance, see Am. Jur. 2d, Nuisances § 206.

2 Fish House, Inc. v. Clarke, 204 N.C. App. 130, 693 S.E.2d 208 (2010).

3 § 163.

4 Nester v. Diamond Match Co., 105 F. 567 (C.C.A. 6th Cir. 1900); Smart v. Aroostook Lumber Co., 103 Me. 37, 68 A. 527 (1907); Viebahn v. Board of Com'rs of Crow Wing County, 96 Minn. 276, 104 N.W. 1089 (1905).

5 Bertram v. State Road Dept., 118 So. 2d 674 (Fla. 3d DCA 1960); Pedrick v. Raleigh & P.S.R. Co., 143 N.C. 485, 55 S.E. 877 (1906).

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§ 183. Action by private person; necessity for and existence of special injury—Interference with rights of riparian owners

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2629

Forms

Am. Jur. Pleading and Practice Forms, Waters § 88 (Complaint, petition, or declaration—To enjoin obstruction of navigable stream—Interfering with operation of commercial marina)

The owner of property situated on a navigable water suffers special injury if that owner is deprived of access to the water from one's property by an obstruction.[1] This is especially the case where the riparian owner does not have other means of access.[2] Interference with this right is a damage special and peculiar to the property as distinguished from the general damage affecting the public's right of navigation.[3] Furthermore, the obstruction need not be directly in front of the riparian owner's land to provide a right to maintain an action to abate it.[4] However, a right of action does not arise if the right of access is not entirely blocked and, because of the character of the water, not essentially impaired.[5]

The fact that tidelands along a navigable river belong to the state does not bar the right of a riparian owner to an injunction against the total obstruction of that part of the stream that is a means of access to the owner's property, nor bar an action for damages resulting from water and logs being thrown on the uplands.[6] Nor does the recovery by a city in ejectment against a

riparian owner of the title to the bed and shores of a navigable river in trust for the public bar a suit by the owner to enjoin interference with the right of access to navigable water.[7] However, a littoral owner who has conveyed to the public a public way along the waterfront may not maintain a suit to enjoin an obstruction to navigable waters in front of that land.[8]

Footnotes

1 Mobile Transp. Co. v. City of Mobile, 153 Ala. 409, 44 So. 976 (1907); Richards v. New York, N.H. & H.R. Co., 77 Conn. 501, 60 A. 295 (1905); Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 57 Fla. 399, 48 So. 643 (1909); Lepire v. Klenk, 169 Mich. 243, 134 N.W. 1119 (1912); Tiffany v. Town of Oyster Bay, 234 N.Y. 15, 136 N.E. 224, 24 A.L.R. 1267 (1922); Reyburn v. Sawyer, 135 N.C. 328, 47 S.E. 761 (1904); Johnson v. Jeldness, 85 Or. 657, 167 P. 798 (1917); Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821, 112 A.L.R. 1104 (1937); Hulet v. Wishkah Boom Co., 54 Wash. 510, 103 P. 814 (1909).
As to interference with a riparian owner's right of access, generally, see § 170.

2 Smart v. Aroostook Lumber Co., 103 Me. 37, 68 A. 527 (1907).

3 Home for Aged Women v. Commonwealth, 202 Mass. 422, 89 N.E. 124 (1909).

4 Carver v. San Pedro, L.A. & S.L.R. Co., 151 F. 334 (C.C.S.D. Cal. 1906).

5 Richards v. New York, N.H. & H.R. Co., 77 Conn. 501, 60 A. 295 (1905).

6 Hutchinson v. Wilson, 54 Wash. 410, 103 P. 474 (1909).

7 Mobile Transp. Co. v. City of Mobile, 153 Ala. 409, 44 So. 976 (1907).

8 McCloskey v. Pacific Coast Co, 160 F. 794, 3 Alaska Fed. 34 (C.C.A. 9th Cir. 1908).

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§ 184. Recovery of damages

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2632

One who sustains a special injury by an unlawful obstruction of navigable waters may maintain an action for the recovery of the resulting damages.[1] One who sustains a special injury as the proximate result of the obstruction of a navigable stream by a bridge may maintain an action at law for the damages sustained even though the obstruction also constitutes a public nuisance.[2] Damage to property caused by stranding in navigable waters is treated as a maritime tort and the remedy is in admiralty and grounded on maritime theories of negligence and damages.[3]

There is a self-help remedy implied into sections of the River and Harbors Act prohibiting obstructions to navigation and providing for enforcement by injunction,[4] allowing the Army Corps of Engineers to remove an obstructing structure[5] and then seek reimbursement from the owner even though the structure was lawfully erected.[6] The Limitation Act, limiting certain liabilities of a vessel owner to the value of the vessel and freight,[7] does not apply to the federal government's civil suit under the River and Harbors Act to recover the actual costs of removing a sunken object from a navigable channel.[8]

In an admiralty action by the Army Corps of Engineers seeking the cost of repairs to a lock or gate, the district court has the discretion to grant or withhold damages, resting its decision on principles of equity and justice.[9]

A state agency may be entitled to collect trespass damages, based on fair market rental value, from a marina operator who did not have a permit to use the waterway.[10]

Footnotes

1 Viebahn v. Board of Com'rs of Crow Wing County, 96 Minn. 276, 104 N.W. 1089 (1905); Hulet v. Wishkah Boom Co., 54 Wash. 510, 103 P. 814 (1909).
As to the special injury requirement, generally, see § 182.

2 Tuell v. Inhabitants of Marion, 110 Me. 460, 86 A. 980 (1913); Viebahn v. Board of Com'rs of Crow Wing County, 96 Minn. 276, 104 N.W. 1089 (1905); Pedrick v. Raleigh & P.S.R. Co., 143 N.C. 485, 55 S.E. 877 (1906).

3 State of Md. Dept. of Natural Resources v. Kellum, 51 F.3d 1220 (4th Cir. 1995).

4 § 185.

5 § 186.

6 U.S. v. Alameda Gateway Ltd., 213 F.3d 1161 (9th Cir. 2000).

7 46 U.S.C.A. § 30505, generally discussed in Am. Jur. 2d, Shipping §§ 397 et seq.

8 In re Southern Scrap Material Co., LLC, 541 F.3d 584 (5th Cir. 2008) (sunken dry dock; the government was not required to allege that the vessel owner negligently caused the sinking).

9 U.S. v. Capital Sand Co., Inc., 466 F.3d 655 (8th Cir. 2006).

10 Northlake Marine Works, Inc. v. State, Dept. of Natural Resources, 134 Wash. App. 272, 138 P.3d 626 (Div. 1 2006) (but since the agency gave the operator implied permission to use the waterway, it was equitably estopped from seeking treble damages under a statute).

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§ 185. Injunction or declaratory judgment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2630, 2631

A court may, in a proper case, enjoin a threatened obstruction to navigation or compel the removal of an existing obstruction.[1] A state court has jurisdiction to order the removal or alteration of a bridge over a navigable river wholly within the limits of the state, which has been erected and maintained without the state's consent and is a public nuisance in impeding the navigation of the river.[2]

The right to equitable relief against obstructions in navigable waters is not confined to the state but in proper cases extends to a private person, and one may maintain an action to restrain its contemplated construction or for its abatement if already constructed.[3]

The Rivers and Harbors Act provides that the creation or continuance of any unlawful obstruction may be prevented by injunction and that proper proceedings to that end may be instituted under the direction of the Attorney General of the United States.[4] In addition to seeking to compel the removal of newly erected piers, the United States has standing to seek a permanent injunction against further illegal construction.[5]

An action against a state agency for a declaratory judgment regarding the purported navigability of a stream and ownership rights in the streambed was barred by the state's sovereign immunity.[6]

Footnotes

1 Blackman v. Mauldin, 164 Ala. 337, 51 So. 23 (1909); Reyburn v. Sawyer, 135 N.C. 328, 47 S.E. 761 (1904); State v. Columbia Water Power Co., 82 S.C. 181, 63 S.E. 884 (1909).

2 Lake Shore & M. S. R. Co. v. State of Ohio, 165 U.S. 365, 17 S. Ct. 357, 41 L. Ed. 747 (1897).

3 McCloskey v. Pacific Coast Co, 160 F. 794, 3 Alaska Fed. 34 (C.C.A. 9th Cir. 1908); Tiffany v. Town of Oyster Bay, 234 N.Y. 15, 136 N.E. 224, 24 A.L.R. 1267 (1922); Hulet v. Wishkah Boom Co., 54 Wash. 510, 103 P. 814 (1909).

4 33 U.S.C.A. § 406.

5 U.S. v. San Juan Bay Marina, 239 F.3d 400, 49 Fed. R. Serv. 3d 336 (1st Cir. 2001).

6 Texas Parks and Wildlife Dept. v. Sawyer Trust, 354 S.W.3d 384 (Tex. 2011).

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§ 186. Summary abatement

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West's Key Number Digest

West's Key Number Digest, Water Law 2631

The United States has standing under the Rivers and Harbors Act to enforce cease and desist orders, and to seek the removal of structures built in violation of the law.[1]

There is a self-help remedy implied into sections of the River and Harbors Act prohibiting obstructions to navigation and providing for enforcement by injunction,[2] allowing the Army Corps of Engineers to remove an obstructing structure.[3]

Footnotes

1 U.S. v. San Juan Bay Marina, 239 F.3d 400, 49 Fed. R. Serv. 3d 336 (1st Cir. 2001).
The evidence supported the presumption that piers were an obstruction to the navigable capacity of a harbor, providing support for the election of the Army Corps of Engineers to remove the piers under the River and Harbors Appropriation Act of 1899, where the Corps expressly determined that portions of the piers prevented the creation of a turning basin that could safely accommodate larger vessels entering the harbor.
U.S. v. Alameda Gateway Ltd., 213 F.3d 1161 (9th Cir. 2000).

2 § 185.

3 U.S. v. Alameda Gateway Ltd., 213 F.3d 1161 (9th Cir. 2000).

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§ 187. Miscellaneous procedure issues in civil cases

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West's Key Number Digest

West's Key Number Digest, Water Law 2629 to 2632

A state court has jurisdiction of a suit by a riparian owner to enjoin the construction of a permanent obstruction to the navigation of a navigable stream of the United States that will interfere with access to the plaintiff's abutting property.[1]

One suing for injury caused by an obstruction to one's use of a navigable stream need not allege that the defendant owed the plaintiff the duty not to obstruct the stream since the defendant owed that duty to all having the right to use the stream.[2] However, it is necessary to show that the defendant had custody of the obstruction to establish that the defendant owed a duty to those using the waterway.[3]

In an action by the United States against a state to enjoin interference with a dam in a navigable river, the complaint should show that the dam was constructed pursuant to federal authorization.[4]

The issue of the navigability of an entire manmade canal was before the court in a trespass action by the possessor of riparian property against a landowner on the other side of the canal such that the court could adjudicate rights in the plaintiff's half of the canal after determining that the canal was a navigable water subject to the public trust doctrine, since the complaint did not limit the trespass action to any particular portion of the canal, and the landowner on the opposite side also raised the issue of navigability as an affirmative defense and as a counterclaim.[5]

Under the provision of the Rivers and Harbors Act prohibiting the creation of an obstruction not authorized by Congress,[6] each enumerated unlawful structure is presumed to be an obstruction to navigable capacity of any waters of the United States that comes within the statute.[7]

Summary judgment was not permitted in a forfeiture action alleging violations of a state's statute governing navigable waters since the procedures in statutes applying to the forfeiture proceeding could not be reconciled with the summary judgment procedure.[8]

Footnotes

1 Johnson v. Jeldness, 85 Or. 657, 167 P. 798 (1917).

2 Cumberland Pipe Line Co. v. Stambaugh, 137 Ky. 528, 126 S.W. 106 (1910).

3 Price v. Tenneco Oil Co., 996 So. 2d 1260 (La. Ct. App. 3d Cir. 2008) (former lessee of an unlighted, unmarked oil well structure situated on the water bottom owned by the state did not have custody of the structure and did not owe a duty to boaters, since the defendant was not the lessee of the property on which the well structure was situated when the accident occurred, as its lease had expired, and evidence was not presented regarding when obstruction lights on the well structure failed to function).

4 U.S. v. State of Ariz., 295 U.S. 174, 55 S. Ct. 666, 79 L. Ed. 1371 (1935).

5 Fish House, Inc. v. Clarke, 204 N.C. App. 130, 693 S.E.2d 208 (2010).

6 33 U.S.C.A. § 403, generally discussed in § 177.

7 U.S. v. Milner, 583 F.3d 1174 (9th Cir. 2009).

8 State v. Ryan, 2012 WI 16, 338 Wis. 2d 695, 809 N.W.2d 37 (2012).

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§ 188. Criminal prosecution

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 2633

Where the obstruction in question constitutes a public nuisance, the person responsible for its existence is subject to criminal prosecution as in other cases of a public nuisance.[1] The Rivers and Harbors Act provides for the criminal prosecution of persons violating its provisions with regard to obstruction of navigable waters.[2]

Footnotes

1 Nester v. Diamond Match Co., 105 F. 567 (C.C.A. 6th Cir. 1900); David M. Swain & Son v. Chicago, B. & Q.R. Co., 252 Ill. 622, 97 N.E. 247 (1911); Lenoir County v. Crabtree, 158 N.C. 357, 74 S.E. 105 (1912).
As to criminal prosecutions for the creation or maintenance of nuisances, see Am. Jur. 2d, Nuisances §§ 339 et seq.

2 33 U.S.C.A. § 406.
Violation of the prohibition on creating an obstruction is a misdemeanor offense. 33 U.S.C.A. § 403a.

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III. Particular Types of Waters or Water Bodies

D. Surface Waters

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Research References

West's Key Number Digest

West's Key Number Digest, Water Law 1160 to 1174, 1184 to 1188, 1195 to 1211, 1788

A.L.R. Library

A.L.R. Index, Waters and Watercourses
West's A.L.R. Digest, Water Law 1160 to 1174, 1184 to 1188, 1195 to 1211, 1788

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III. Particular Types of Waters or Water Bodies

D. Surface Waters

1. In General

§ 189. Generally; definition and nature

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1160, 1161

The term "surface water" is used in the law of waters in reference to a distinct form or class of water generally defined as that derived from falling rain or melting snow, or which rises to the surface in springs, and is diffused over the surface of the ground while it remains in such diffused state or condition.[1] Another definition is that surface waters are waters on the surface of the ground of a casual or vagrant character, following no definite course, of a more or less temporary existence and which spread at random over the ground and are lost or disappear by percolation into the soil, by evaporation,[2] or by flowing into a natural watercourse.[3]

The chief characteristic of surface water is its inability to maintain its identity and existence as a body of water.[4] It is thus distinguished from water flowing in a natural watercourse[5] or collected into and forming a definite and identifiable body, such as a lake or pond.[6] However, what starts out as surface water may become a natural watercourse at the point where it begins to flow in a reasonably well defined channel with a bed and banks.[7] When surface waters reach and become part of a natural watercourse, they lose their character as surface waters and come under the rules governing watercourses.[8] Surface water may also lose its character as such by the collection thereof into a definite body, such as a lake or pool.[9] However the diversion of surface water from its natural course by artificial means or conditions does not necessarily deprive it of its character or status as such.[10]

CUMULATIVE SUPPLEMENT

Cases:

Water that drained from adjacent property onto landowner's property was surface water, and thus trial court could not grant summary judgment to landowner on his trespass claim against adjacent property's owner and owner's tenant without analyzing the claim under the reasonable-use standard, pursuant to which a possessor incurred liability only when his harmful interference with the flow of surface water was unreasonable; water at issue accumulated on adjacent property, percolated beneath the surface, drained into a culvert via subsurface drainage tiles, and flowed onto complaining landowner's property. Bonkoski v. Lorain County, 2018-Ohio-2540, 115 N.E.3d 859 (Ohio Ct. App. 9th Dist. Lorain County 2018), appeal not allowed, 154 Ohio St. 3d 1464, 2018-Ohio-5209, 114 N.E.3d 215 (2018).

[END OF SUPPLEMENT]

Footnotes

1 Libby, McNeil & Libby v. Roberts, 110 So. 2d 82 (Fla. 2d DCA 1959); B & B, LLC v. Lake Erie Land Co., 943 N.E.2d 917 (Ind. Ct. App. 2011), transfer denied, 962 N.E.2d 641 (Ind. 2011); Collins v. Wickland, 251 Minn. 419, 88 N.W.2d 83 (1958); Mader v. Mettenbrink, 159 Neb. 118, 65 N.W.2d 334 (1954); Wellman v. Kelley, 197 Or. 553, 252 P.2d 816 (1953); Sun Underwriters Ins. Co. of N. Y. v. Bunkley, 233 S.W.2d 153 (Tex. Civ. App. Fort Worth 1950), writ refused; King County v. Boeing Co., 62 Wash. 2d 545, 384 P.2d 122 (1963); McCausland v. Jarrell, 136 W. Va. 569, 68 S.E.2d 729 (1951).
Water impounded from a river was not surface water, and because the water impounded by the owners' dams/reservoirs from the river was not surface water, the owners could not be held liable to downstream home and business owners, whose properties were flooded, for the negligent interference with surface water. Stormes v. United Water New York, Inc., 84 A.D.3d 1352, 923 N.Y.S.2d 719 (2d Dep't 2011).

2 Woods v. Incorporated Town of State Centre, 249 Iowa 38, 85 N.W.2d 519 (1957).

3 Drogen Wholesale Elec. Supply, Inc. v. State, 27 A.D.2d 763, 276 N.Y.S.2d 1015 (3d Dep't 1967).

4 Weck v. Los Angeles County Flood Control Dist., 104 Cal. App. 2d 599, 232 P.2d 293 (2d Dist. 1951).

5 Woods v. Incorporated Town of State Centre, 249 Iowa 38, 85 N.W.2d 519 (1957); Collins v. Wickland, 251 Minn. 419, 88 N.W.2d 83 (1958); McCausland v. Jarrell, 136 W. Va. 569, 68 S.E.2d 729 (1951).
The term "surface water" includes such as is carried off by surface drainage—that is, drainage independent of a watercourse. Mader v. Mettenbrink, 159 Neb. 118, 65 N.W.2d 334 (1954).
As to natural watercourses, see §§ 86 et seq.

6 Woods v. Incorporated Town of State Centre, 249 Iowa 38, 85 N.W.2d 519 (1957); Davis v. Fry, 1904 OK 69, 14 Okla. 340, 78 P. 180 (1904).

7 § 90.

8 Dimmock v. City of New London, 157 Conn. 9, 245 A.2d 569, 42 A.L.R.3d 417 (1968); Withers v. Berea College, 349 S.W.2d 357 (Ky. 1961); Lackaff v. Bogue, 158 Neb. 174, 62 N.W.2d 889 (1954).

9 Davis v. Fry, 1904 OK 69, 14 Okla. 340, 78 P. 180 (1904).

10 Le Brun v. Richards, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336 (1930).

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D. Surface Waters

1. In General

§ 190. Ownership, control, and use

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1163, 1169

The owner of the soil has the absolute right to the surface water thereon,[1] and an owner may, in the improvement of its lands, or for its own use, retain all such water and prevent it from percolating or flowing upon the lower land of an adjoining proprietor; or the owner may so drain the surface water as to prevent any portion of it reaching the lower lands.[2] Thus, the right of the higher owner to retain, and if the owner sees fit, to appropriate, all of the surface waters to its own use is based on the owner's dominion over the soil, which extends indefinitely upwards and downwards.[3]

Surface water, as long as it remains on the lands of a person and is used by such person for proper purposes, is not waste water and does not, in any event, become such until it has escaped and reached the land of another, and until then, the latter cannot make a valid appropriation of it.[4] When surface water reaches a natural watercourse, it becomes subject to appropriation.[5] Indeed, as soon as surface waters reach a natural watercourse, an owner of soil on which they fall loses the exclusive right to appropriate them even if the natural watercourse is on his or her own land.[6]

While in some cases the right of retention and use by the owner of the soil has been predicated or conditioned on the absence of any contractual or prescriptive right in the lower proprietor,[7] there is other authority to the effect that the right to the flow of surface water from an adjoining tract cannot be acquired by prescription.[8]

Footnotes

1 Withers v. Berea College, 349 S.W.2d 357 (Ky. 1961); Republic Production Co. v. Collins, 41 S.W.2d 100 (Tex. Civ. App. Eastland 1931), writ dismissed w.o.j., (Oct. 28, 1931); Garns v. Rollins, 41 Utah 260, 125 P. 867 (1912).

2 Walker v. New Mexico & S P R Co, 165 U.S. 593, 17 S. Ct. 421, 41 L. Ed. 837 (1897); Withers v. Berea College, 349 S.W.2d 357 (Ky. 1961); Benson v. Cook, 47 S.D. 611, 201 N.W. 526 (1924); Miller v. Letzerich, 121 Tex. 248, 49 S.W.2d 404, 85 A.L.R. 451 (1932).

3 Pohlman v. Chicago, M. & St. P.R. Co., 131 Iowa 89, 107 N.W. 1025 (1906).

4 Burkart v. Meiberg, 37 Colo. 187, 86 P. 98 (1906).

5 Withers v. Berea College, 349 S.W.2d 357 (Ky. 1961); Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 89 A.L.R. 200 (1933).

6 Dimmock v. City of New London, 157 Conn. 9, 245 A.2d 569, 42 A.L.R.3d 417 (1968).

7 Miller v. Letzerich, 121 Tex. 248, 49 S.W.2d 404, 85 A.L.R. 451 (1932).

8 Garns v. Rollins, 41 Utah 260, 125 P. 867 (1912).

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2. Drainage; Interference with Natural Flow

a. In General

§ 191. Common-enemy doctrine

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1163 to 1173

A.L.R. Library

Modern status of rules governing interference with drainage of surface waters, 93 A.L.R.3d 1193

Law Reviews and Other Periodicals

Whitmer, Common enemy or unilateral threat: why jurisdictions need to become reasonable in regards to diffuse surface waters, 41 Creighton L. Rev. 423 (2008)

The "common-enemy doctrine" allows landowners to alter the flow of surface water to the detriment of their neighbors so long as they do not block a watercourse or natural drainway.[1] Under the "common enemy rule" regarding diversion of surface waters naturally flowing across land, a landowner has the right to improve land by changing its surface or erecting structures on it unrestricted by the fact that improvements may cause surface water naturally flowing or accumulating on its land either to stand

in unusual quantities on the neighbor's lands or to pass onto and over them in greater quantities and in other directions than it would otherwise flow.[2] The obstruction of surface water, or an alteration in its flow, affords no cause of action to a person who suffers loss or detriment therefrom against one who does not act inconsistent with the lawful exercise of dominion over its own soil.[3] Water that meets the definition of surface water is regarded as an outlaw and a common enemy against which anyone may defend him- or herself even though by so doing, injury may result to others.[4] Some states adhere to this rule although not necessarily under a specific name or doctrine.[5]

Some cases based upon the adoption of the common-enemy doctrine hold without qualification that no cause of action can arise in any case from throwing back surface waters upon the land of the dominant estate,[6] and there are jurisdictions in which the doctrine is followed in all its rigor with regard to urban property.[7] However, most of the states which have adopted it in theory have done so with certain restrictions and modifications,[8] and many of the courts which originally adopted the theory have switched to a standard of reasonableness.[9]

It has been said the common-enemy doctrine does not give a landowner license to harm neighboring properties.[10] The dominant owner is entitled to drain the surface water in a natural watercourse from his or her land over the servient owner's land, and if any damage results, the servient owner is without remedy, but if the volume of water is substantially increased or the manner or method of drainage is substantially changed and actual damage results, the servient owner is entitled to relief.[11]

Footnotes

1 Fitzpatrick v. Okanogan County, 169 Wash. 2d 598, 238 P.3d 1129 (2010).
As to the opposing civil law rule, see § 192.

2 Cloverleaf Farms, Inc. v. Surratt, 169 Ind. App. 554, 349 N.E.2d 731 (1976); LaForm v. Bethlehem Tp., 346 Pa. Super. 512, 499 A.2d 1373 (1985); Johnson v. Phillips, 315 S.C. 407, 433 S.E.2d 895 (Ct. App. 1993), decision aff'd in part, rev'd in part on other grounds, 318 S.C. 453, 458 S.E.2d 427 (1995) (stating this is the English common law regarding diversion of surface waters naturally flowing across land).
Under the common-enemy doctrine, either the upper or lower owner may improve its land in any suitable manner and is not liable for diffused surface water which, as a result, goes upon the land of another, and the fact that the lower owner has acted first in making improvements does not give him or her superior rights. Kossoff v. Rathgeb-Walsh, Inc., 3 N.Y.2d 583, 170 N.Y.S.2d 789, 148 N.E.2d 132 (1958).
The water at issue in a nuisance, trespass, and negligence action brought by landowners against a neighboring landowner arising from the failure of a septic system due to the flooding of a man-made pond was not surface water, and therefore, the common-enemy doctrine, which recognized that all property owners held dominion over their property with respect to the control of water, did not apply to bar recovery as the evidence established that the water was subsurface water that leaked from the pond. Kinsel v. Schoen, 934 N.E.2d 133 (Ind. Ct. App. 2010).

3 Cloverleaf Farms, Inc. v. Surratt, 169 Ind. App. 554, 349 N.E.2d 731 (1976); LaForm v. Bethlehem Tp., 346 Pa. Super. 512, 499 A.2d 1373 (1985); Johnson v. Phillips, 315 S.C. 407, 433 S.E.2d 895 (Ct. App. 1993), decision aff'd in part, rev'd in part on other grounds, 318 S.C. 453, 458 S.E.2d 427 (1995).
The law of surface waters states that water must flow as it is wont to flow; thus, only where water is diverted from its natural channel or where it is unreasonably or unnecessarily changed in quantity or quality is there a legal injury. Colombari v. Port Authority of Allegheny County, 951 A.2d 409 (Pa. Commw. Ct. 2008).

4 Fitzpatrick v. Okanogan County, 169 Wash. 2d 598, 238 P.3d 1129 (2010).

5 Johnson v. Whitten, 384 A.2d 698 (Me. 1978); Bihuniak v. Roberta Corrigan Farm, 17 Neb. App. 177, 757 N.W.2d 725 (2008).

6 Wilkening v. State, 54 Wash. 2d 692, 344 P.2d 204 (1959).

7 § 196.

8 § 193.

9 § 193.

10 Williamson v. City of Hays, 275 Kan. 300, 64 P.3d 364 (2003).

11 Grace Hodgson Trust v. McClannahan, 569 N.W.2d 397 (Iowa Ct. App. 1997).

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2. Drainage; Interference with Natural Flow

a. In General

§ 192. Civil law rule

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1163 to 1173

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Modern status of rules governing interference with drainage of surface waters, 93 A.L.R.3d 1193

Diametrically opposed to the common-enemy doctrine[1] is the civil law rule which recognizes a natural servitude for natural drainage between adjoining lands so that the lower owner must accept the surface water which naturally drains onto its land, but on the other hand, the upper owner can do nothing to change the natural system of drainage so as to increase the natural burden.[2] Thus, every landowner must bear the burden of receiving upon its land the surface water naturally falling upon land above it and naturally flowing to it from the land above it, and such landowner has the corresponding right to have the surface water naturally falling upon its land or naturally coming upon it flow freely therefrom upon the lower land adjoining as it would flow under natural conditions.[3] From these rights and burdens, the principle follows that a landowner has a lawful right to complain of others, who, by interfering with natural conditions, cause such surface water to be discharged in greater quantity or in a different manner upon his or her land than would occur under natural conditions.[4] In some jurisdictions, the civil law rule is held applicable to rural, and inapplicable to urban, property.[5]

Footnotes

1 § 191.

2 King v. Adams, 349 So. 2d 611 (Ala. Civ. App. 1977) (rule applies to rural property); Seminole County v. Mertz, 415 So. 2d 1286 (Fla. 5th DCA 1982); Newton's Crest Homeowners' Ass'n v. Camp, 306 Ga. App. 207, 702 S.E.2d 41 (2010), cert. granted, (Feb. 28, 2011) and judgment aff'd, 290 Ga. 257, 719 S.E.2d 442 (2011); Dayley v. City of Burley, 96 Idaho 101, 524 P.2d 1073 (1974); Bodenschatz v. Parrott, 153 Ill. App. 3d 1008, 106 Ill. Dec. 817, 506 N.E.2d 617 (5th Dist. 1987); Dufour v. Mayeux, 664 So. 2d 577 (La. Ct. App. 3d Cir. 1995), writ denied, 666 So. 2d 1101 (La. 1996); Kahl v. Texaco, Inc., 281 Or. 337, 574 P.2d 650 (1978); Gross v. Connecticut Mut. Life Ins. Co., 361 N.W.2d 259 (S.D. 1985); Ardis Mobile Home Park v. State, 910 S.W.2d 863 (Tenn. Ct. App. 1995), not designated for publication.
Under a "civil rule," the owner of the higher estate has the right to allow surface water to follow the natural course of drainage onto the lower estate and may even construct artificial devices such as ditches or drains to more efficiently carry off surface water. Hahn v. County of Kane, 2012 IL App (2d) 110060, 358 Ill. Dec. 194, 964 N.E.2d 1216 (App. Ct. 2d Dist. 2012).

3 Gutierrez v. County of San Bernardino, 198 Cal. App. 4th 831, 130 Cal. Rptr. 3d 482 (4th Dist. 2011), review denied, (Nov. 16, 2011).

4 Gutierrez v. County of San Bernardino, 198 Cal. App. 4th 831, 130 Cal. Rptr. 3d 482 (4th Dist. 2011), review denied, (Nov. 16, 2011).

5 § 196.

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2. Drainage; Interference with Natural Flow

a. In General

§ 193. Modification of common-enemy doctrine

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Forms

Am. Jur. Pleading and Practice Forms, Waters §§ 239, 240 (Complaint, petition, or declaration—Drainage of waste irrigation water—Wrongful discharge)

In many jurisdictions, the common-enemy doctrine is modified by importing into it qualifications based on concepts of reasonable use or negligence.[1] Under a modified common-law rule applicable to surface water, surface water is a common enemy that owners may fight off provided they do so reasonably and in good faith and not wantonly, unnecessarily, or carelessly.[2] One state follows a modified version of the common enemy rule providing that surface water which does not flow in defined

channels is a common enemy and that each landowner may deal with it in such manner as best suits his or her own convenience.[3] Under the modified common-enemy doctrine in some jurisdictions, a landowner, in the reasonable use and development of his or her land, may drain it by building artificial water channels to carry surface waters into a natural surface water channel without liability to the owner of neighboring land, even though such method of ridding the property of surface water accelerates and increases the flow thereof, provided that the landowner acts without negligence and does not exceed the natural capacity of the drainway.[4] Other jurisdictions' modification of the common-enemy doctrine provide that a landowner cannot use or improve land so as to increase the volume of surface waters which flow from it onto the land of others,[5] nor can a landowner discharge surface waters from its land onto other lands in a different course from its natural flow if by doing so, the landowner causes substantial damage.[6] Still other courts modify the common-enemy doctrine to provide that surface waters may be repelled or deflected onto lands of others provided such deflection is the result of an ordinary use of the land and is not accompanied by the use of channels, ditches, or other extraordinary construction[7] and so long as the actor does not exercise her rights wantonly, unnecessarily, or carelessly but in good faith and with such care as not to injure the adjacent property owner needlessly.[8] Another modification to the common-enemy doctrine states that a landowner may protect its land against surface waters without regard to the effect of such improvement on surrounding landowners but only if the upland owner's use is reasonable.[9]

Observation:

In one state, there are three judicially created exceptions to the common-enemy doctrine that landowners may dispose of unwanted surface waters in any way they see fit, without liability for resulting damage to neighboring properties: the first exception provides that a landowner who inhibits the flow of a natural watercourse or drainway may still be held liable for damage to neighboring properties; the second exception prohibits a landowner from artificially collecting water and then channeling it to his or her neighbors' land; and the third exception requires a property owner to exercise due care in improving his or her land to minimize unnecessary surface water impacts upon adjacent lands.[10]

Footnotes

1 Central Nat. Ins. Co. v. City of Kansas City, Mo., 546 F. Supp. 1237 (W.D. Mo. 1982) (applying Missouri law); Falco v. James Peter Associates, Inc., 165 Conn. 442, 335 A.2d 301 (1973); Ballard v. Ace Wrecking Co., 289 A.2d 888 (D.C. 1972); Musumeci v. State, 43 A.D.2d 288, 351 N.Y.S.2d 211 (4th Dep't 1974); Kurpiel v. Hicks, 731 S.E.2d 921 (Va. 2012).

2 Kurpiel v. Hicks, 731 S.E.2d 921 (Va. 2012).

3 Crowel v. Marshall County Drainage Bd., 971 N.E.2d 638 (Ind. 2012).

4 Central Nat. Ins. Co. v. City of Kansas City, Mo., 546 F. Supp. 1237 (W.D. Mo. 1982) (applying Missouri law); Paasch v. Brown, 190 Neb. 421, 208 N.W.2d 695 (1973); Musumeci v. State, 43 A.D.2d 288, 351 N.Y.S.2d 211 (4th Dep't 1974).

5 Falco v. James Peter Associates, Inc., 165 Conn. 442, 335 A.2d 301 (1973).
An upper landowner had the right to have surface waters that were naturally on his land flow freely onto a lower landowner's adjoining property so long as the surface waters flowed under natural conditions. LaPuzza v. Sedlacek, 218 Neb. 285, 353 N.W.2d 17 (1984).

6 Falco v. James Peter Associates, Inc., 165 Conn. 442, 335 A.2d 301 (1973).

7 Ballard v. Ace Wrecking Co., 289 A.2d 888 (D.C. 1972).

8 Ballard v. Ace Wrecking Co., 289 A.2d 888 (D.C. 1972); Mullins v. Greer, 226 Va. 587, 311 S.E.2d 110 (1984).

A landowner may divert surface water providing it can be done without injury to an adjoining landowner. Iven v. Roder, 1967 OK 143, 431 P.2d 321 (Okla. 1967).

9 Morris v. McNicol, 83 Wash. 2d 491, 519 P.2d 7 (1974).

10 Lord v. Pierce County, 166 Wash. App. 812, 271 P.3d 944 (Div. 2 2012), review denied, 174 Wash. 2d 1015, 281 P.3d 687 (2012).

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a. In General

§ 194. Modification of civil law rule

Topic Summary | Correlation Table | References

West's Key Number Digest

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The civil law rule has been modified by many courts under general negligence[1] or reasonableness principles.[2] Some courts apply a modified civil law rule which permits natural drainage conditions to be altered by an upper proprietor provided that the water is not sent down in a manner or quantity that will do more harm than formerly.[3] In some jurisdictions, an upper landowner may be liable to a lower landowner for trespass if the diversion of water onto the plaintiff's land is intentional or arises out of the upper landowner's abnormally hazardous activity.[4]

Under the modified "civil law rule," when a landowner diverts surface waters in an unnatural manner and damages a lower property, the upper landowner is liable in tort to the extent it failed to take reasonable care in the use of the upper property.[5]

Observation:

Under the modified civil law rule to determine the liability of an upper landowner who diverts surface waters in an unnatural manner and damages a lower property, (1) if the upper owner is reasonable and the lower owner unreasonable, the upper owner wins; (2) if the upper owner is unreasonable and the lower owner reasonable, the lower owner wins; and (3) if both the upper and lower owner are reasonable, the lower owner wins also.[6]

Some courts, recognizing that the civil law rule may unduly restrict development even in rural areas, have propounded the good husbandry modification of the civil law rule, allowing the owner of upper land to accelerate the natural flow by such drainage system as might be required by good husbandry, so long as the water is not diverted from its natural path.[7] However, the dominant estate's right to increase the rate or amount of runoff onto the servient estate under the "good husbandry exception" is not unlimited.[8]

Footnotes

1 Mitchell v. Mackin, 376 So. 2d 684 (Ala. 1979); Sells v. Nickerson, 76 Or. App. 686, 711 P.2d 171 (1985).

2 Mitchell v. Mackin, 376 So. 2d 684 (Ala. 1979); Templeton v. Huss, 57 Ill. 2d 134, 311 N.E.2d 141 (1974).

3 Hankins v. Borland, 163 Colo. 575, 431 P.2d 1007 (1967); DeWitt v. DeWitt, 259 Iowa 1037, 147 N.W.2d 32 (1966).
It is impermissible for a dominant landowner to collect surface waters and then cast them upon the servient estate in unusual or unnatural quantities; an actionable injury may occur if increases in volume or rate cause flooding or erosion. Knodel v. Kassel Tp., 1998 SD 73, 581 N.W.2d 504 (S.D. 1998).

4 Sells v. Nickerson, 76 Or. App. 686, 711 P.2d 171 (1985).

5 Skoumbas v. City of Orinda, 165 Cal. App. 4th 783, 81 Cal. Rptr. 3d 242 (1st Dist. 2008).

6 Skoumbas v. City of Orinda, 165 Cal. App. 4th 783, 81 Cal. Rptr. 3d 242 (1st Dist. 2008).

7 Templeton v. Huss, 57 Ill. 2d 134, 311 N.E.2d 141 (1974); Garbarino v. Van Cleave, 214 Or. 554, 330 P.2d 28 (1958).

8 Hahn v. County of Kane, 2012 IL App (2d) 110060, 358 Ill. Dec. 194, 964 N.E.2d 1216 (App. Ct. 2d Dist. 2012).

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2. Drainage; Interference with Natural Flow

a. In General

§ 195. Modification of general rules; determination of, and what constitutes, reasonableness

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1163 to 1173

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Under the modified rules introducing the element of reasonableness in determining the propriety of drainage of surface waters,[1] each case must be dealt with on its own facts and circumstances.[2] Many courts have adopted the standard of reasonable use, which attempts to avoid the rigidities of either the civil law or common-enemy doctrines and to determine the rights of the parties by an assessment of all the relevant factors, as the controlling principle in determining rights with respect to interference with the drainage of surface waters.[3] The circumstances which may be considered include the nature and importance of improvements made, the reasonable foreseeableness of the injury, the extent of interference with the water, and the amount of injury done to other landowners compared to the value of the improvements.[4] In determining the question of reasonableness under the "reasonable use" rule, it is proper to take into consideration such factors as the amount of harm caused, the foreseeability of the harm which results, the purpose or motive with which the possessor acted, and such other relevant matters as the question whether the utility of the possessor's use of his or her land outweighs the gravity of the harm which results from alteration of the flow of the surface waters.[5] Other factors that may be considered include the availability of mutual solutions to water drainage problems and the negligence or willful misconduct by the party acting to control the surface water.[6] What is reasonable in an

urban area is likely to differ from what is reasonable in a rural area,[7] and some courts have adopted different rules for rural and urban areas.[8]

Footnotes

1 § 194.

2 Jones v. California Development Company, 173 Cal. 565, 160 P. 823 (1916).
In regard to the drainage of surface waters under the modified rules, the question is not one of negligence accountability but rather one of reasonableness of conduct. Keys v. Romley, 64 Cal. 2d 396, 50 Cal. Rptr. 273, 412 P.2d 529 (1966).

3 DeSanctis v. Lynn Water and Sewer Com'n, 423 Mass. 112, 666 N.E.2d 1292 (1996); Evers v. Willaby, 444 N.W.2d 856 (Minn. Ct. App. 1989); Hall v. Wood, 443 So. 2d 834 (Miss. 1983); Sheppard v. Township of Frankford, 261 N.J. Super. 5, 617 A.2d 666 (App. Div. 1992); Soo Line R. Co. v. Office of Com'r of Transp., 170 Wis. 2d 543, 489 N.W.2d 672 (Ct. App. 1992).

4 Rodrigues v. State, 52 Haw. 156, 52 Haw. 283, 472 P.2d 509 (1970); Rounds v. Hoelscher, 428 N.E.2d 1308 (Ind. Ct. App. 1981) (disapproved of on other grounds by, Argyelan v. Haviland, 435 N.E.2d 973 (Ind. 1982)).

5 Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4, 59 A.L.R.2d 413 (1956).

6 Rounds v. Hoelscher, 428 N.E.2d 1308 (Ind. Ct. App. 1981) (disapproved of on other grounds by, Argyelan v. Haviland, 435 N.E.2d 973 (Ind. 1982)).

7 Collins v. Wickland, 251 Minn. 419, 88 N.W.2d 83 (1958).

8 § 196.

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III. Particular Types of Waters or Water Bodies

D. Surface Waters

2. Drainage; Interference with Natural Flow

a. In General

§ 196. Urban property

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1163 to 1173

A.L.R. Library

Modern status of rules governing interference with drainage of surface waters, 93 A.L.R.3d 1193

Some courts normally applying the civil law rule have recognized that it is not adapted to the needs of urban communities where the primary use of land is for the erection of structures which are likely to interfere with natural drainage and accordingly have adopted common-enemy or modified common-enemy rules in cases involving such land.[1] Accordingly, not only in the jurisdictions where the common-enemy doctrine prevails but also in many states which ordinarily follow the civil law rule it is recognized that in the case of urban property, changes and alterations in the surface are essential to the enjoyment of such property[2] and that the owner of a city or town lot has the right to fill it up, elevate it, ditch it, or construct buildings or embankments on it in such a manner as to protect it against the surface water of an adjoining lot.[3] So it has been widely recognized that as to urban property, the enjoyment of which depends largely upon the ability to improve it by raising or grading its surface, the common-enemy doctrine is preferable, and it has therefore been held, in a large number of the cases, that owners of such property are entitled to raise the surface of their land as they see fit, regardless of the fact that, as a result, natural drainage of surface waters is interfered with.[4]

On the other hand, the courts of some of the states in which the civil law rule prevails have failed to see any difference in principle between the reciprocal rights and duties of adjacent urban proprietors and those of adjacent rural proprietors and have refused to apply one rule to agricultural lands and another to city or town lots.[5] In any case, one who interferes with the natural flow of surface water may not proceed negligently so as to do unnecessary damage to others.[6] Also, where alternative methods of disposing of the water are available at substantially the same cost, that which will cause the least injury must be adopted.[7] Furthermore, where public drainage facilities are reasonably available, they should be utilized.[8]

It has been said that, although modern mass home-building projects are properly considered as a social benefit, no reason suggests itself, why in justice, the economic cost incident to the expulsion of surface waters in the transformation of rural or semirural areas into urban or suburban communities should be borne in every case by adjoining landowners rather than by those who engage in such projects for profit; social progress and the common well-being are in actuality better served by a just and right balancing of the competing interests according to general principles of fairness and common sense attending application of the rule of reason.[9]

Footnotes

1 Bailey v. Floyd, 416 So. 2d 404 (Ala. 1982); Dovin v. Winfield Tp., 164 Ill. App. 3d 326, 115 Ill. Dec. 433, 517 N.E.2d 1119 (2d Dist. 1987) (overruled on other grounds by, Gerill Corp. v. Jack L. Hargrove Builders, Inc., 128 Ill. 2d 179, 131 Ill. Dec. 155, 538 N.E.2d 530 (1989)); Westbury Realty Corp. v. Lancaster Shopping Center, Inc., 396 Pa. 383, 152 A.2d 669 (1959).

2 Dekle v. Vann, 279 Ala. 153, 182 So. 2d 885 (1966); Woods v. Incorporated Town of State Centre, 249 Iowa 38, 85 N.W.2d 519 (1957); Miller v. Letzerich, 121 Tex. 248, 49 S.W.2d 404, 85 A.L.R. 451 (1932).

3 Hume v. City of Des Moines, 146 Iowa 624, 125 N.W. 846 (1910); Lunsford v. Stewart, 95 Ohio App. 383, 53 Ohio Op. 388, 120 N.E.2d 136 (2d Dist. Franklin County 1953); Taylor v. Harrison Const. Co., 178 Pa. Super. 544, 115 A.2d 757 (1955).

4 Timmons v. Clayton, 222 Ark. 327, 259 S.W.2d 501 (1953); Liston v. Scott, 108 Kan. 180, 194 P. 642 (1921); Keiser v. Mann, 102 Ohio App. 324, 2 Ohio Op. 2d 357, 143 N.E.2d 146 (4th Dist. Pike County 1956).

5 Calvaresi v. Brannan Sand & Gravel Co., 35 Colo. App. 271, 534 P.2d 652 (App. 1975); Cannon v. City of Macon, 81 Ga. App. 310, 58 S.E.2d 563 (1950); Johnson v. Marcum, 152 Ky. 629, 153 S.W. 959 (1913).

6 Rielly v. Stephenson, 222 Pa. 252, 70 A. 1097 (1908).
In the absence of statute, at least with respect to urban property, the liability of one who causes an unintentional but substantial invasion of land of another by interfering with the flow of surface water depends upon whether his or her conduct was negligent, reckless, or ultrahazardous; where the invasion is intentional, liability depends on whether the invasion was unreasonable. City of Houston v. Renault, Inc., 431 S.W.2d 322 (Tex. 1968).

7 Holman v. Richardson, 115 Miss. 169, 76 So. 136 (1917).

8 Ginter v. Rector, etc., of St. Mark's Church in City of Minneapolis, 95 Minn. 14, 103 N.W. 738 (1905).

9 Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4, 59 A.L.R.2d 413 (1956).

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III. Particular Types of Waters or Water Bodies

D. Surface Waters

2. Drainage; Interference with Natural Flow

a. In General

§ 197. Contractual rights; licenses

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1184 to 1187

It has been said that the right of drainage through the lands of another is an easement requiring for its enjoyment an interest in the lands and cannot be conferred except by deed or conveyance in writing, that it cannot be conferred by parol license, and that a license to lay a drain does not vest any title or give any irrevocable easement in the land, even though a consideration is paid for it, at least in the absence of proof that revocation will work irreparable damage to the licensee.[1] However, where adjoining landowners have jointly constructed a drainage ditch over their lands under an oral agreement as to its course, and each has contributed labor and money in its construction, afterward plowing and farming in accord with it, neither can set it aside without the consent of the other.[2]

CUMULATIVE SUPPLEMENT

Cases:

Right-of-way deeds conveyed easements, rather than fee title, to county board of drain commissioners, where, rather than granting and conveying a strip, piece, parcel, or tract of land, the deeds explicitly stated that they grant a "right of way" through the specified land, and the deeds specifically limited the purposes of the right of way for the laying out, construction, and maintenance of a public drain. Sargent County Water Resource Dist. v. Mathews, 2015 ND 277, 2015 WL 7737938 (N.D. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Manning v. Hall, 110 So. 2d 424 (Fla. 2d DCA 1959).

2 Manning v. Hall, 110 So. 2d 424 (Fla. 2d DCA 1959); Eppling v. Seuntjens, 254 Iowa 396, 117 N.W.2d 820 (1962); Munch v. Stetler, 109 Minn. 403, 124 N.W. 14 (1910).

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2. Drainage; Interference with Natural Flow

a. In General

§ 198. Statutory provisions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1163 to 1173

Rights and liabilities in respect of the drainage of surface water may be governed by statute.[1] Such statutes have in several instances been sustained as against objections on constitutional grounds, including the impairment of vested rights[2] or of contractual obligations and the denial of the equal protection of the laws or of due process of law.[3] They have also been sustained in some instances as a proper exercise of the police power.[4]

It has been held that the rule that surface water may be diverted onto the land of an adjacent owner, to his or her injury, without liability, creates no vested right to be impaired by a statute making such diversion unlawful and that such a statute is a proper exercise of the police power, even as to existing levees and ditches operating to divert the natural flow and cast the water on adjoining lands, and is not unconstitutional as taking or requiring the destruction of such previously constructed ditches and levees since it operates only on their future use in such a manner as to damage the adjoining owner.[5] On the other hand, it has been stated that any attempt to increase the easement appurtenant to upper land with the consequential increase of the burden upon the lower land existing under the civil law would be an interference with the vested rights of the owners of the servient estate.[6]

A duty of strict liability is imposed by a statute prohibiting a person from diverting or impounding the natural flow of surface water in a manner that damages the property of another by the overflow of the water diverted or impounded.[7] It follows that claims for a violation of such a statute by the improper diversion of surface water are not dependent upon any finding as to the defendant's negligence.[8] There can be more than one proximate cause of statutory damages resulting from the improper diversion of surface water.[9]

Practice Tip:

The elements of a statutory claim for improper diversion of surface water, under a state water code, are: (1) a diversion or impoundment of surface water which (2) causes (3) damage to the property of the plaintiff landowner. The plaintiff carries the burden to prove the unlawful diversion caused damages to the plaintiff's property which would not have resulted but for such unlawful diversion.[10]

Footnotes

1 Contreras v. Bennett, 361 S.W.3d 174 (Tex. App. El Paso 2011).

2 Miller v. Letzerich, 121 Tex. 248, 49 S.W.2d 404, 85 A.L.R. 451 (1932).

3 Chicago & A.R. Co. v. Tranbarger, 238 U.S. 67, 35 S. Ct. 678, 59 L. Ed. 1204 (1915) (applying Missouri law).

4 Chicago & A.R. Co. v. Tranbarger, 238 U.S. 67, 35 S. Ct. 678, 59 L. Ed. 1204 (1915); Miller v. Letzerich, 121 Tex. 248, 49 S.W.2d 404, 85 A.L.R. 451 (1932).

5 Miller v. Letzerich, 121 Tex. 248, 49 S.W.2d 404, 85 A.L.R. 451 (1932).

6 Thompson v. Andrews, 39 S.D. 477, 165 N.W. 9 (1917).

7 Texas Woman's University v. The Methodist Hosp., 221 S.W.3d 267 (Tex. App. Houston 1st Dist. 2006).

8 Contreras v. Bennett, 361 S.W.3d 174 (Tex. App. El Paso 2011).

9 Contreras v. Bennett, 361 S.W.3d 174 (Tex. App. El Paso 2011).

10 Contreras v. Bennett, 361 S.W.3d 174 (Tex. App. El Paso 2011).

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III. Particular Types of Waters or Water Bodies

D. Surface Waters

2. Drainage; Interference with Natural Flow

a. In General

§ 199. Persons and organizations liable

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1162, 1174

Generally, what would be illegal in the drainage of surface waters in the case of a private individual is likewise illegal when attempted by the public authorities. Unless by agreement or in the exercise of the power of eminent domain and by the payment of damages the public authorities have acquired the right to collect and discharge water on the land of another, they ordinarily have no more right to do so than has a private individual.[1]

The alleged flooding of a landowner's property was not proximately caused by a breach of duty owed to the landowner by the current owner of the neighboring property, for purposes of the landowner's negligence action against the current owner of the property, as the previous owner of the neighboring property had constructed a berm that was the alleged cause of the flooding on the landowner's property.[2]

Footnotes

1 Louisville & N.R. Co. v. City of Louisville, 131 Ky. 108, 114 S.W. 743 (1908); Wrightsel v. Fee, 76 Ohio St. 529, 81 N.E. 975 (1907).

2 Smith v. Campus Edge of Hattiesburg, LLC, 30 So. 3d 1284 (Miss. Ct. App. 2010).

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2. Drainage; Interference with Natural Flow

b. Application of General Rules; Circumstances Affecting Rights and Liabilities

(1) In General

§ 200. Augmenting, accelerating, or changing natural flow; collecting and discharging water

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1163 to 1173

A.L.R. Library

Modern status of rules governing interference with drainage of surface waters, 93 A.L.R.3d 1193

Trial Strategy

Unreasonable Alteration of Surface Drainage, 109 Am. Jur. Proof of Facts 3d 403

Although property must accept the natural runoff of water from neighboring lands, an artificial increase or concentration of water discharge may give rise to a cause of action.[1] The servitude for natural drainage cannot be augmented or made more burdensome by the upper landowner, nor can the upper landowner artificially accumulate water and release it in unnatural concentrations.[2] An owner of land which is situated over other lands, the upper landowner, is liable for water which flows onto

land which lies underneath the incline when the upper landowner has, by artificial means, discharged the water in a manner that unreasonably damages the lower landowner.[3] Thus, the owner of the upper estate in a natural servitude from the natural flow of surface waters may not concentrate the surface water and pour it through an artificial ditch or drain, in unusual quantities and greater velocity, upon an adjacent landowner.[4] Stated another way, in a natural servitude, the owner of the dominant estate may not, by changing conditions on its land, put a greater burden on the servient estate by increasing and concentrating the volume and velocity of the surface water.[5]

An owner's right to discharge surface water from its premises does not extend so far as to permit the landowner to collect it in a volume and by means of an artificial channel discharge it upon another's land contrary to the natural course of drainage to the latter's damage and detriment.[6] However, under the common-enemy doctrine, even as modified,[7] there seems to be no doubt but that an owner of upper land, acting in the reasonable use of its property and without negligence, may augment the flow of surface waters to the land below either by increasing the volume or by changing the mode of flow.[8] Even under the common-enemy doctrine, it has been said that a landowner may not collect or concentrate surface water and cast it, in a body, upon its neighbor, and this point is further clarified as throwing or casting surface water on one's neighbor in unusual quantities so as to amplify the force at a given point or points.[9] An upper landowner cannot compel a lower landowner to provide drainage facilities to carry off an amount of water increased artificially above the natural drainage level.[10]

Observation:

It is not unlawful under the common-enemy doctrine to accelerate or increase the flow of surface water by limiting or eliminating ground absorption or changing the grade of the land. It is one thing to grade a highway and cast off artificial water as a consequence of grading and quite another thing to change the natural flow, unite artificial channels, increase the volume of water, and cause it to flow upon private property in an increased volume.[11]

In one state, a landowner will not be liable for damages to an abutting property caused by the flow of surface water due to improvements to its land provided that the improvements were made in good faith to fit the property for some rational use and that the water was not drained onto the other property by artificial means, such as pipes and ditches.[12] In this state, for purposes of determining a property owner's liability for damages to a neighboring property as the result of the diversion of surface water, paving alone, as opposed to pipes, sluices, drains, or ditches, does not constitute an artificial means of diversion.[13]

An owner whose land drains naturally onto the land of a neighbor may install conduits on its own land, and on the neighbor's land with the neighbor's permission, to concentrate and speed the flow of water beyond the slow natural process by which it would ultimately reach its destination provided this does not increase the amount of water that flows over the neighbor's land.[14]

CUMULATIVE SUPPLEMENT

Cases:

In effecting a reasonable use of his land for a legitimate purpose, a landowner, acting in good faith, may drain his land of surface waters and cast them as a burden upon the land of another, although such drainage carries with it some waters which otherwise never would have gone that way but would have remained on the land until they were absorbed by the soil or evaporated in the air. Maddock v. Andersen, 2013 ND 80, 830 N.W.2d 627 (N.D. 2013).

A landowner may collect damages when (1) a diversion or impoundment of surface water, (2) causes (3) damage to the property of the landowner. V.T.C.A., Water Code § 11.086(b). Salazar v. Sanders, 440 S.W.3d 863 (Tex. App. El Paso 2013), review denied, (July 11, 2014).

[END OF SUPPLEMENT]

Footnotes

1 Green v. Eastland Homes, Inc., 284 Ga. App. 643, 644 S.E.2d 479 (2007).

2 Utter v. Gibbins, 137 Idaho 361, 48 P.3d 1250 (2002).

3 Martin v. Flanagan, 818 So. 2d 1124 (Miss. 2002).

4 Wiggins v. City of Burton, 291 Mich. App. 532, 805 N.W.2d 517 (2011); Skogen v. Hemen Tp. Bd. of Tp. Sup'rs, 2010 ND 92, 782 N.W.2d 638 (N.D. 2010).
A landowner may not in diverting surface waters from its usual and ordinary course collect and convey it by the construction of artificial embankments, ditches, or the like from that person's land onto the land of an adjoining neighbor causing injury to the latter's property and that such conduct is actionable. Moneypenney v. Dawson, 2006 OK 53, 141 P.3d 549 (Okla. 2006).

5 Wiggins v. City of Burton, 291 Mich. App. 532, 805 N.W.2d 517 (2011).

6 Bihuniak v. Roberta Corrigan Farm, 17 Neb. App. 177, 757 N.W.2d 725 (2008).
As to surface water, one land proprietor has no right to concentrate and collect it and thus cause it to be discharged upon the land of a lower proprietor in greater quantities at a particular locality or in a manner different from that in which the water would be received by the lower estate if it simply ran down upon it from the upper by the law of gravitation. Bailey v. Annistown Road Baptist Church, Inc., 301 Ga. App. 677, 689 S.E.2d 62 (2009).

7 §§ 191, 193.

8 Ferri v. Pyramid Const. Co., 186 Conn. 682, 443 A.2d 478 (1982); Haferkamp v. City of Rock Hill, 316 S.W.2d 620 (Mo. 1958); McCauley v. Phillips, 216 Va. 450, 219 S.E.2d 854 (1975).

9 Pflum v. Wayne County Bd. of Com'rs, 892 N.E.2d 233 (Ind. Ct. App. 2008).

10 Pierce Family, Inc. v. Magness Const. Co., 43 Del. Ch. 425, 235 A.2d 268 (1967).

11 Pflum v. Wayne County Bd. of Com'rs, 892 N.E.2d 233 (Ind. Ct. App. 2008).

12 Papadopoulos v. Town of North Hempstead, 84 A.D.3d 768, 922 N.Y.S.2d 481 (2d Dep't 2011).

13 Prachel v. Town of Webster, 96 A.D.3d 1365, 946 N.Y.S.2d 341 (4th Dep't 2012).

14 Fiebelkorn v. Alford, 105 So. 3d 110 (La. Ct. App. 2d Cir. 2012).

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(1) In General

§ 201. Augmenting, accelerating, or changing natural flow; collecting and discharging water—Qualifications and exceptions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1163 to 1173

Trial Strategy

Unreasonable Alteration of Surface Drainage, 109 Am. Jur. Proof of Facts 3d 403

Forms

Am. Jur. Pleading and Practice Forms, Waters § 206 (Complaint, petition, or declaration—Flood damage—Obstruction of natural watercourse by railroad)

Am. Jur. Pleading and Practice Forms, Waters § 207 (Complaint, petition, or declaration—Flood damage—Obstruction of natural watercourse by street embankment)

In some jurisdictions, interference with the natural flow of surface water incident to the use of the dominant estate in the ordinary way for farming purposes is not within the general rule[1] imposing liability for injury resulting to an adjoining proprietor from the acceleration, diversion, channeling, or increase in the volume thereof.[2] Thus, there are numerous decisions to the effect that the owner of higher land may, for the purpose of cultivating land, fill up sag holes although the water collected therein may thereby find its way to the lower land.[3] Furthermore, the rule in some jurisdictions is that a person has a right to drain its land for any legitimate use and is not liable for interference with the natural flow of surface water by the construction of improvements on its own premises, whether the improvement is directly and wholly for the purpose of drainage or for some other purpose, and such drainage is a mere incidental result; but if the person collects and conveys the surface water off its own land, the person must do what is reasonable under all the circumstances to turn it into some natural drain or into some course in which it will do the least injury to any neighbors.[4] It has even been said that a dominant landowner may alter or increase the natural flow of water from his or her property if the advantages to the dominant land sufficiently outweigh the damages to the servient land[5] although an adjacent property owner's right to alter the natural drainage on its land is qualified by the need to make a reasonable effort to minimize the resulting harm to lower landowners.[6]

Natural drainage conditions may be altered by an upper proprietor provided that the water is not sent down in a manner or quantity to do more harm than formerly.[7]

Under the reasonable use doctrine,[8] landowners were held not liable for any damages that plaintiffs may have suffered as a result of improvements made in natural drainways by the landowners where the ditching or streamlining of ditches by the landowners did not drain any large potholes or sloughs but merely gathered the water that normally would have spread out over a larger area into a narrower channel along the natural drainway and had the effect of improving and aiding the normal and natural drainage systems.[9]

Footnotes

1 § 200.

2 Miller v. Letzerich, 121 Tex. 248, 49 S.W.2d 404, 85 A.L.R. 451 (1932).

3 Launstein v. Launstein, 150 Mich. 524, 114 N.W. 383 (1907).

4 Ginter v. Rector, etc., of St. Mark's Church in City of Minneapolis, 95 Minn. 14, 103 N.W. 738 (1905); Aldritt v. Fleischauer, 74 Neb. 66, 103 N.W. 1084 (1905); Todd v. York County, 72 Neb. 207, 100 N.W. 299 (1904).

5 Swigert v. Gillespie, 364 Ill. Dec. 613, 976 N.E.2d 1176 (App. Ct. 4th Dist. 2012), appeal denied (Ill. Jan. 30, 2013).

6 Mississippi Gulf Properties, LLC v. Eagle Mechanical, Inc., 98 So. 3d 1097 (Miss. Ct. App. 2012).

7 Hankins v. Borland, 163 Colo. 575, 431 P.2d 1007 (1967).

8 § 193.

9 Jacobsen v. Pedersen, 190 N.W.2d 1 (N.D. 1971).

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2. Drainage; Interference with Natural Flow

b. Application of General Rules; Circumstances Affecting Rights and Liabilities

(1) In General

§ 202. Water cast upon upper land by artificial means; damming back water

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1163 to 1173

A.L.R. Library

Modern status of rules governing interference with drainage of surface waters, 93 A.L.R.3d 1193

One of the most common situations calling for the application of one of the general rules governing the disposition of surface waters occurs when a lower owner, wishing to protect or improve its land, raises a dam or embankment against the flow of surface water onto the land, thus casting back on the upper land the surface water which would normally drain down and across the lower land. The common-enemy doctrine, in its unmodified form, has often been held to authorize the lower landowner to so cast back surface waters without liability.[1] However, under various modifications of the common-enemy doctrine, the right to dam against surface waters so as to force them back upon the upper tenement may be limited.[2]

The civil law rule, at least in its unmodified form, appears to forbid the lower landowner from damming back the natural flow of surface water[3] or diverting surface water to the upper tract by artificial means or conditions.[4]

Footnotes

1 Boyd v. Greene County, 7 Ark. App. 110, 644 S.W.2d 615 (1983); Cloverleaf Farms, Inc. v. Surratt, 169 Ind. App. 554, 349 N.E.2d 731 (1976); Heins Implement Co. v. Missouri Highway & Transp. Com'n, 859 S.W.2d 681 (Mo. 1993) (abrogated on other grounds by, Southers v. City of Farmington, 263 S.W.3d 603 (Mo. 2008)); Barry v. Wittmersehouse, 212 Neb. 909, 327 N.W.2d 33 (1982); Halverson v. Skagit County, 139 Wash. 2d 1, 983 P.2d 643 (1999), as amended, (Sept. 10, 1999).

Under the common-enemy rule, a landowner was not liable for harm to a highway from surface waters running from a dike or embankment constructed without negligence and necessary for protection of the land. Scotts Bluff County v. Hartwig, 160 Neb. 823, 71 N.W.2d 507 (1955).

Under the common-enemy doctrine as modified by the rule of reason each proprietor might divert surface water, casting it back on or passing it along to, the next proprietor, provided he or she can do so without injury to the adjoining landowners, but no one is permitted to sacrifice a neighbor's property in order to protect his or her own. King v. Cade, 1951 OK 344, 205 Okla. 666, 240 P.2d 88 (1951).

As to the common-enemy doctrine, see § 191.

2 Holman v. Richardson, 115 Miss. 169, 76 So. 136 (1917) (lower owner could not use his own property to injure others); Barry v. Wittmersehouse, 212 Neb. 909, 327 N.W.2d 33 (1982) (lower owner required to use ordinary care); Haskins v. Felder, 1954 OK 102, 270 P.2d 960 (Okla. 1954) (any casting back of diffused surface waters must be done reasonably and with due regard for the rights of others).

3 Hargreaves v. Skrbina, 635 P.2d 221 (Colo. App. 1981), judgment aff'd in part, rev'd in part on other grounds, 662 P.2d 1078 (Colo. 1983); Dodd v. Blezek, 245 Iowa 1112, 66 N.W.2d 104 (1954); Poole v. Guste, 261 La. 1110, 262 So. 2d 339 (1972); Payne v. Touchstone, 372 So. 2d 1277 (Miss. 1979); Nicholson v. Spangenberg, 163 N.J. Super. 128, 394 A.2d 371 (App. Div. 1978); Gregory v. Jenkins, 665 S.W.2d 397 (Tenn. Ct. App. 1983).

As to the civil law rule, see § 192.

4 Le Brun v. Richards, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336 (1930).

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2. Drainage; Interference with Natural Flow

b. Application of General Rules; Circumstances Affecting Rights and Liabilities

(1) In General

§ 203. Raising surface level of land

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1163 to 1173

A.L.R. Library

Liability for diversion of surface water by raising surface level of land, 88 A.L.R.4th 891

In cases involving private property located or apparently located in cities, some courts have attached liability for the diversion of surface water by raising the surface level of land where residential property was raised, resulting in the diversion of surface water onto other residential property,[1] or where commercial or agricultural land was raised, resulting in diversion onto residential[2] or other commercial or agricultural land.[3] In other cases, the owners of residential land in cities have been held not liable for the alleged diversion of surface water by raising the surface level of land despite adverse effects on the residential property of others.[4]

As to the raising of the surface level of commercial or agricultural property in areas other than cities, some courts have held that commercial or agricultural owners could be liable for diverting surface water onto residential,[5] commercial or agricultural,[6] or other or unspecified land.[7] Other courts, under different circumstances, have held commercial or agricultural landowners

not liable despite surface water diversions allegedly damaging residential,[8] commercial or agricultural,[9] or other or unspecified land.[10]

A deed did not create a general right for a dominant tenement owner to drain all surface waters over the servient tenement owner's lot, and thus, the servient owner's act of raising the elevation of his lot through grading operations so as to prevent surface waters from flowing out of the dominant owner's lot did not give rise to actionable claims of intentional obstruction of a drainage easement, negligent obstruction of a drainage easement, and violation of third-party beneficiary rights as according to the express language of the deed, the drainage had to be effectuated through the use of a natural watercourse, and there was no such natural watercourse at the time the dispute arose.[11]

Footnotes

1 Falco v. James Peter Associates, Inc., 165 Conn. 442, 335 A.2d 301 (1973); Ernst v. H. H. Burstein Enterprises, Inc., 379 So. 2d 852 (La. Ct. App. 4th Cir. 1980); Allen v. Morris Bldg. Co., 360 Mich. 214, 103 N.W.2d 491 (1960); Bily v. Omni Equities, Inc., 731 S.W.2d 606 (Tex. App. Houston 14th Dist. 1987), writ refused n.r.e., (July 15, 1987).

2 Pickerill v. City of Louisville, 125 Ky. 213, 30 Ky. L. Rptr. 1239, 100 S.W. 873 (1907).

3 Hargreaves v. Skrbina, 635 P.2d 221 (Colo. App. 1981), judgment aff'd in part, rev'd in part on other grounds, 662 P.2d 1078 (Colo. 1983); McGehee v. Tidewater Ry. Co., 108 Va. 508, 62 S.E. 356 (1908).

4 Sachs v. Chiat, 281 Minn. 540, 162 N.W.2d 243 (1968); Crawford v. City of Meridian, 186 So. 2d 250 (Miss. 1966); Roberts v. Hocker, 610 S.W.2d 321 (Mo. Ct. App. W.D. 1980); Young v. Huffman, 77 S.D. 254, 90 N.W.2d 401 (1958).

5 Howe v. DiPierro Mfg. Co., Inc., 1 Mass. App. Ct. 81, 294 N.E.2d 495 (1973); Groff v. Circle K. Corp., 86 N.M. 531, 525 P.2d 891 (Ct. App. 1974); Bradley v. Texaco, Inc., 7 N.C. App. 300, 172 S.E.2d 87 (1970).

6 Pirtle v. Opco, Inc., 269 Ark. 862, 601 S.W.2d 265 (Ct. App. 1980); Ditch v. Hess, 212 N.W.2d 442 (Iowa 1973); Le Van v. Hedlund Plumbing and Heating, 37 Mich. App. 271, 194 N.W.2d 725 (1971); Groff v. Circle K. Corp., 86 N.M. 531, 525 P.2d 891 (Ct. App. 1974).

7 Goodwin v. Texas Co., 133 Me. 260, 176 A. 873 (1935); Soule v. Galveston County, 246 S.W.2d 491 (Tex. Civ. App. Galveston 1951), writ refused.

8 Pittsburg, C., C. & St. L. Ry. Co. v. Atkinson, 51 Ind. App. 315, 97 N.E. 353 (1912).

9 Hopson v. Downs, 340 S.W.2d 475 (Ky. 1960); Thomas v. Estate of Ducat, 769 S.W.2d 819, 88 A.L.R.4th 885 (Mo. Ct. App. W.D. 1989).

10 Camden Special Road Dist. of Ray County v. Taylor, 495 S.W.2d 93 (Mo. Ct. App. 1973); Scotts Bluff County v. Hartwig, 160 Neb. 823, 71 N.W.2d 507 (1955).

11 Hurlburt v. DeRosa, 137 Conn. App. 463, 49 A.3d 249 (2012).

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78 Am. Jur. 2d Waters § 204

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III. Particular Types of Waters or Water Bodies

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2. Drainage; Interference with Natural Flow

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(1) In General

§ 204. Rights in respect of artificial changes and conditions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1170

Forms

Am. Jur. Pleading and Practice Forms, Waters § 208 (Complaint, petition, or declaration—Deflection of current of natural stream by adjacent landowner)

Changes made in the natural drainage of surface water by mutual agreement, or which are acquiesced in by persons whose interests are affected thereby, may become binding upon the person making such change as well as upon others so consenting thereto or acquiescing therein.[1] Where the upper and lower proprietors of land have by agreement established an artificial drainway to take the place of a natural drainway for surface waters, the maxim "sic utere tuo ut alienum non laedas," requiring each to so use its own property as not to injure the rights of the other, applies to the use and maintenance of the artificial drainway by the lower proprietor.[2]

Footnotes

1 Mauvaisterre Drainage & Levee Dist. v. Wabash Ry. Co., 299 Ill. 299, 132 N.E. 559, 22 A.L.R. 944 (1921).
As to rights in respect of artificial conditions created by others, generally, see § 8.

2 Roder v. Krom, 150 N.W.2d 708 (N.D. 1967).

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§ 205. Acquisition of rights by prescription

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1788

Forms

Am. Jur. Pleading and Practice Forms, Waters § 282 (Answer—Defense—Prescriptive right of drainage across plaintiff's land)

Am. Jur. Pleading and Practice Forms, Waters § 283 (Answer—Defense—Prescriptive right to obstruct drainage)

The general rule that water rights may be acquired by prescription or adverse user[1] applies to the right of drainage of surface waters through the lands of another.[2] However, the mere fact that surface water has flowed, even from time immemorial, from the lands of an upper owner across those of a lower owner, standing alone, with no other facts shown, would not give rise to such an easement.[3] The right to run a drain through another's land can be created by actual use only where such use has been adverse, peaceable, uninterrupted, and continued for the prescriptive period.[4] A merely permissive user cannot ripen into a prescriptive right,[5] and the prescriptive right to cast water onto adjoining property cannot be acquired by underground drains of which the owner of such property has no knowledge.[6]

CUMULATIVE SUPPLEMENT

Cases:

Uphill ranch owner's use of downhill ranch owner's property to send water down steep draw through downhill ranch to river was under claim of right and adverse to downhill ranch, as required for uphill owner to establish prescriptive easement to permit the owner to send water down the draw; whether or not downhill owner filed for wastewater right for water out of the draw, uphill owner sent water down the draw for decades, both before and after the water right. Lemhi County v. Moulton, 414 P.3d 226 (Idaho 2018).

[END OF SUPPLEMENT]

Footnotes

1 § 382.

2 Hankins v. Borland, 163 Colo. 575, 431 P.2d 1007 (1967); Saelens v. Pollentier, 7 Ill. 2d 556, 131 N.E.2d 479 (1956); Naporra v. Weckwerth, 178 Minn. 203, 226 N.W. 569, 65 A.L.R. 124 (1929); Town of Hamburg v. Gervasi, 269 A.D. 393, 55 N.Y.S.2d 876 (4th Dep't 1945).

3 Town of Hamburg v. Gervasi, 269 A.D. 393, 55 N.Y.S.2d 876 (4th Dep't 1945).

4 Alderman v. City of New Haven, 81 Conn. 137, 70 A. 626 (1908); Farrar v. Shuss, 221 Mo. App. 472, 282 S.W. 512 (1926); Roe v. Howard County, 75 Neb. 448, 106 N.W. 587 (1906); Deason v. Southern Ry. Co., 142 S.C. 328, 140 S.E. 575 (1927).

5 Jones v. Stover, 131 Iowa 119, 108 N.W. 112 (1906).

6 Holman v. Richardson, 115 Miss. 169, 76 So. 136 (1917).

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(1) In General

§ 206. Extinguishment by prescription of natural servitude for drainage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1188

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Extinguishment by prescription of natural servitude for drainage of surface waters, 42 A.L.R.4th 462

In many of the jurisdictions where a natural servitude for the drainage of surface water exists,[1] such a servitude may be extinguished by prescription, or in other words, the right to be free from the natural flow of such waters may be acquired by prescription.[2] In the case of an obstruction on the servient estate, the courts have applied the general rules of prescription, namely, that there must be an adverse user under a claim of right,[3] that the user must be continuous and uninterrupted for the prescriptive period,[4] that the user must be visible and notorious[5] and must be with the knowledge or acquiescence of the dominant owner.[6]

In the case of an obstruction on the dominant estate, the courts have reasoned that where the owner thereof erected and maintained, with the acquiescence of the servient owner, a barrier that diverted the flow of surface water continuously and uninterruptedly for the prescriptive period, reciprocal rights were created by prescription, exempting the dominant owner from

the necessity of restoring the natural flow and releasing the servient estate from the natural servitude for the drainage of surface water.[7]

It is generally recognized that the owner of the servient or lower estate, or the one claiming that the natural servitude for the drainage of surface waters has been extinguished by prescription, has the burden of proving it.[8]

Where the prescriptive right to maintain an obstruction to the natural flow of surface waters has been acquired, it has been held that while the obstruction may be maintained at its original height, it may not be increased.[9]

Footnotes

1 § 192.

2 Johnson v. Gustafson, 49 Idaho 376, 288 P. 427 (1930); Nelson v. Gundlock, 120 Ill. App. 3d 117, 75 Ill. Dec. 610, 457 N.E.2d 1052, 42 A.L.R.4th 453 (4th Dist. 1983); Archer v. J.S. Compton, Inc., 238 Iowa 1182, 30 N.W.2d 92 (1947); Kougl v. Curry, 73 S.D. 427, 44 N.W.2d 114, 22 A.L.R.2d 1039 (1950).

3 Meyers v. Kissner, 217 Ill. App. 3d 136, 160 Ill. Dec. 140, 576 N.E.2d 1094 (5th Dist. 1991), rev'd on other grounds, 149 Ill. 2d 1, 171 Ill. Dec. 484, 594 N.E.2d 336 (1992); Fennema v. Menninga, 236 Iowa 543, 19 N.W.2d 689 (1945); Grammas v. Colasurdo, 48 N.J. Super. 543, 138 A.2d 553 (App. Div. 1958); Kougl v. Curry, 73 S.D. 427, 44 N.W.2d 114, 22 A.L.R.2d 1039 (1950).

4 Nelson v. Gundlock, 120 Ill. App. 3d 117, 75 Ill. Dec. 610, 457 N.E.2d 1052, 42 A.L.R.4th 453 (4th Dist. 1983); Savoie v. Town of Bourbonnais, 339 Ill. App. 551, 90 N.E.2d 645 (2d Dist. 1950); Grammas v. Colasurdo, 48 N.J. Super. 543, 138 A.2d 553 (App. Div. 1958); Kougl v. Curry, 73 S.D. 427, 44 N.W.2d 114, 22 A.L.R.2d 1039 (1950).

5 Grammas v. Colasurdo, 48 N.J. Super. 543, 138 A.2d 553 (App. Div. 1958).

6 Meyers v. Kissner, 217 Ill. App. 3d 136, 160 Ill. Dec. 140, 576 N.E.2d 1094 (5th Dist. 1991), rev'd on other grounds, 149 Ill. 2d 1, 171 Ill. Dec. 484, 594 N.E.2d 336 (1992); Powell v. Dawson, 469 N.E.2d 1179 (Ind. Ct. App. 1984); Archer v. J.S. Compton, Inc., 238 Iowa 1182, 30 N.W.2d 92 (1947); Fennema v. Menninga, 236 Iowa 543, 19 N.W.2d 689 (1945).

7 Mauvaisterre Drainage & Levee Dist. v. Wabash Ry. Co., 299 Ill. 299, 132 N.E. 559, 22 A.L.R. 944 (1921).

8 Johnson v. Gustafson, 49 Idaho 376, 288 P. 427 (1930); Beechley v. Harms, 332 Ill. 185, 163 N.E. 387 (1928); Fennema v. Menninga, 236 Iowa 543, 19 N.W.2d 689 (1945); Kougl v. Curry, 73 S.D. 427, 44 N.W.2d 114, 22 A.L.R.2d 1039 (1950).

9 Beechley v. Harms, 332 Ill. 185, 163 N.E. 387 (1928); Matteson v. Tucker, 131 Iowa 511, 107 N.W. 600 (1906).

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§ 207. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1171

The owner of lands through or along the border of which a natural watercourse flows may accumulate surface water falling upon lands adjacent thereto, and cast the same into such stream, without liability to a lower riparian owner for damages, although the flow of the waters is thereby accelerated and the volume increased, provided that this is done in the reasonable use of his or her own land.[1]

The same right of drainage exists in the case of natural depressions or drainways through which the surface water on the higher land drains onto the lower land, and the flow of surface water along such depressions or drainways may be hastened and incidentally increased by artificial means so long as the water is not diverted from its natural flow.[2] In other words, causing surface water to flow in its natural direction through a ditch on one's own land, instead of over the surface or by percolation as formerly, where no new watershed is tapped and no addition to the former volume of surface water is caused thereby, except the mere carrying in a ditch of what formerly reached the same point on the servient tract over a wider surface by percolation through the soil or by flowing over such wider surface, is not, when not negligently done, a wrongful or an unlawful act.[3] Practically the same rule is established in some states by statutes to the effect that owners of land may drain it in the general course of natural drainage by constructing open or covered drains and discharging them into any natural watercourse, or into any natural channel or depression whereby the water will be carried into some natural watercourse, and when such drainage is wholly upon the owner's land, he or she is be liable in damages therefor to any person or persons or corporation.[4]

A public agency is liable for diversion of surface waters into a natural watercourse only if its conduct posed an unreasonable risk of harm to the plaintiffs, and that unreasonable conduct is a substantial cause of the damage to plaintiff's property.[5]

Footnotes

1 State of North Dakota v. State of Minnesota, 263 U.S. 365, 44 S. Ct. 138, 68 L. Ed. 342 (1923); Diedrich v. Farnsworth, 3 Ariz. App. 264, 413 P.2d 774 (1966); Sheffet v. County of Los Angeles, 3 Cal. App. 3d 720, 84 Cal. Rptr. 11 (2d Dist. 1970); Ambrosio v. Perl-Mack Const. Co., 143 Colo. 49, 351 P.2d 803 (1960); Stouder v. Dashner, 242 Iowa 1340, 49 N.W.2d 859 (1951); Oakwood Club v. City of South Euclid, 83 Ohio L. Abs. 153, 165 N.E.2d 699 (Ct. App. 8th Dist. Cuyahoga County 1960).
A landowner, "for a reasonable purpose," might discharge surface waters into a stream into which they naturally drained without incurring liability for damages caused by the increased flow. Callens v. Orange County, 129 Cal. App. 2d 255, 276 P.2d 886 (4th Dist. 1954).

2 Lessenger v. City of Harlan, 184 Iowa 172, 168 N.W. 803, 5 A.L.R. 1523 (1918); Flesner v. Steinbruck, 89 Neb. 129, 130 N.W. 1040 (1911); Smith v. Orben, 119 N.J. Eq. 291, 182 A. 153 (Ch. 1935); Trigg v. Timmerman, 90 Wash. 678, 156 P. 846 (1916).
A landowner, in the absence of negligence, may, in the interest of good husbandry, accelerate surface water in the natural course of drainage without liability to the lower proprietor. Bihuniak v. Roberta Corrigan Farm, 17 Neb. App. 177, 757 N.W.2d 725 (2008).

3 Carter v. Hawaii County, 47 Haw. 68, 384 P.2d 308 (1963); Stouder v. Dashner, 242 Iowa 1340, 49 N.W.2d 859 (1951); Smith v. Orben, 119 N.J. Eq. 291, 182 A. 153 (Ch. 1935).

4 Lessenger v. City of Harlan, 184 Iowa 172, 168 N.W. 803, 5 A.L.R. 1523 (1918); Jontz v. Northup, 157 Iowa 6, 137 N.W. 1056 (1912).

5 Skoumbas v. City of Orinda, 165 Cal. App. 4th 783, 81 Cal. Rptr. 3d 242 (1st Dist. 2008).

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§ 208. Nature, extent, and limits of right

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1171

The right of one to accumulate and discharge surface water into a natural watercourse and thereby accelerate the flow or increase the volume thereof, without liability for damages, is subject to the general limitation that it be done in the reasonable use of his or her own land.[1] The right also depends upon the watercourse traversing or bordering the lands drained.[2] Another important limitation upon such right is that an owner of property may not drain into a stream surface waters which otherwise would not flow in that direction. That is, the dominant owner may not, by ditches or drains, or the removal of natural barriers, direct surface water from its natural course into a stream, to the damage of lower proprietors.[3] Also, according to the generally accepted view, where, by means of ditches or drains, so much surface water is thrown into a stream as to fill it beyond its natural capacity, and to cause it to overflow and flood the lands of a lower proprietor, the upper proprietor is liable for the resulting damages.[4] However, there is authority to the effect that a landowner, in draining land for a useful and proper purpose, is not necessarily limited to the capacity of the natural outlet.[5]

In one state, a landowner has no cause of action for damages arising from the diversion of water flowing in a watercourse because such water is no longer "diffused surface water" for purposes of a statute prohibiting a person from diverting or impounding the natural flow of surface water in a manner that damages the property of another by the overflow of the water diverted or impounded.[6]

Footnotes

1 § 207.

2 Armstrong v. Westroads Development Co., 380 S.W.2d 529 (Mo. Ct. App. 1964).

3 Carter v. Hawaii County, 47 Haw. 68, 384 P.2d 308 (1963); Todd v. York County, 72 Neb. 207, 100 N.W. 299 (1904).

4 State of North Dakota v. State of Minnesota, 263 U.S. 365, 44 S. Ct. 138, 68 L. Ed. 342 (1923); City of Birmingham v. Nichols, 241 Ala. 106, 1 So. 2d 5 (1941); Smith v. Orben, 119 N.J. Eq. 291, 182 A. 153 (Ch. 1935); Lumley v. Village of Hamburg, 181 A.D. 441, 170 N.Y.S. 462 (4th Dep't 1918).

5 Board of Drainage Com'rs of Drainage Dist. No. 10 of Bolivar County v. Board of Drainage Com'rs of Washington County, 130 Miss. 764, 95 So. 75, 28 A.L.R. 1250 (1923); Mizell v. McGowan, 129 N.C. 93, 39 S.E. 729 (1901).

6 Texas Woman's University v. The Methodist Hosp., 221 S.W.3d 267 (Tex. App. Houston 1st Dist. 2006).

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§ 209. Obstruction of flow

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1171

Forms

Am. Jur. Pleading and Practice Forms, Waters § 257 (Checklist—Drafting complaint or petition in action to enjoin or recover damages caused by obstruction of drainage of water from plaintiff's land)

Am. Jur. Pleading and Practice Forms, Waters § 258 (Complaint, petition, or declaration—Obstruction of drainage through natural watercourse)

There is a conflict of opinion as to whether the owner of a lower tenement may obstruct surface water running in a natural drainway, thereby causing such water to flow back on the upper proprietor. In some jurisdictions, the courts, professing an adherence to the common-enemy doctrine, have held or recognized that the lower landowner may obstruct the flow of surface water in a swale, gulch, or other natural drainway without incurring liability to the upper proprietor for injuries caused by the backing up of such water.[1] The rule supported by the great preponderance of the courts, however, is that both under the civil law rule as to surface waters and under the common-enemy doctrine, a natural drainway must be kept open to carry the water into the streams, and as against the rights of the upper proprietor, the lower proprietor cannot obstruct surface water when it has found its way to and is running in a natural drainage channel or depression.[2] It is the duty of a lower landowner who builds a

structure across a natural drainway to provide for the natural passage through such obstruction of all of the water which may be reasonably anticipated to drain therein and that this is a continuing duty.[3]

Footnotes

1 Barnett v. Matagorda Rice & Irrigation Co., 98 Tex. 355, 83 S.W. 801 (1904).

2 Tide Water Oil Sales Corp. v. Shimelman, 114 Conn. 182, 158 A. 229, 81 A.L.R. 256 (1932); Nichol v. Yocum, 173 Neb. 298, 113 N.W.2d 195 (1962); Buffalo Sewer Authority v. Town of Cheektowaga, 20 N.Y.2d 47, 281 N.Y.S.2d 326, 228 N.E.2d 386 (1967); International-Great Northern R. Co. v. Reagan, 121 Tex. 233, 49 S.W.2d 414 (1932); Atlantic Coast Line R. Co. v. Southern Oil & Feed Mills, 129 Va. 323, 106 S.E. 337 (1921).
In the case of an open drainway which follows a natural drainage depression leading downgrade, the owner of each upper estate has an easement or servitude in the lower estates for the drainage of surface water flowing in its natural course and manner, without obstruction or interruption by the owners of the lower estates to the detriment or injury of the upper estates. Johnson v. City of Winston-Salem, 239 N.C. 697, 81 S.E.2d 153, 44 A.L.R.2d 949 (1954).

3 Soules v. Northern Pac. Ry. Co., 34 N.D. 7, 157 N.W. 823 (1916).

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(2) Drainage into or Through Natural Watercourse or Drainway

§ 210. What constitutes natural watercourse or drainway

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1171

A great variety of terms, such as "depression," "drainway," "channel," "watercourse," "waterway," "swale," "draw," "gulch," "ravine," "ditch," etc., have been employed in describing natural ways or means for the drainage of surface water, or the course of such drainage, and there is considerable variance in the rules which obtain in different jurisdictions as to the kind and physical characteristics of such ways, means, or courses.[1] The term "watercourse" is frequently used in this connection in the sense of a watercourse in respect of which riparian rights exist, as well as in the sense of a mere way or course of drainage of surface water.[2]

The view taken by some authorities is that if the conformation of the land is such as to give to the surface water flowing from one tract to the other a fixed and determinate course, so as to discharge it uniformly on the servient tract at a fixed and definite point, the course thus uniformly followed by the water in its flow is a watercourse within the meaning of the rules applicable to the drainage of surface water.[3] Some jurisdictions require that there must be a distinct channel, the bed of a stream, with well-defined banks, cut through the turf and into the soil by the flowing of the water, presenting on a casual glance the evidences of the frequent action of running water, and not a mere depression.[4]

A ravine, gorge, or similar depression, by means of which the surface water of a hilly or mountainous country is drained, constitutes a natural drainway.[5] The term "watercourse," as used in a statute prohibiting the obstruction of watercourses, has been held to include any well-defined channel or arroyo in which surface waters flow in times of heavy rain.[6] Under the rule which obtains in some jurisdictions, the fact that the depression or swale is cultivated the same as other land in the dry seasons

does not necessarily mean that it is not a natural drainway.[7] Also, the fact that in certain places the water of the depression spreads out and no longer flows in a defined channel has been held not to prevent the depression from being a natural drainway.[8]

A mere canal or ditch will not be considered a natural watercourse, unless it is a enlargement or alteration of an existing natural watercourse, even though it is the most convenient way to drain the land.[9] There is, however, some authority for the proposition that an artificial ditch constructed by the owner of the land may sometimes constitute a natural drainway or watercourse for the flow of surface water.[10]

Footnotes

1 Collins v. Wickland, 251 Minn. 419, 88 N.W.2d 83 (1958).
A lower landowner was ordered to remove a dam which he had constructed across a swale which drained excess water from a depression on the plaintiff's land, the court saying that where surface water flowed in a well-defined course in a ditch, swale, or draw in its primitive condition, its flow could not be arrested or interfered with to the injury of neighboring proprietors. Ricenbaw v. Kraus, 157 Neb. 723, 61 N.W.2d 350 (1953).

2 See Thompson v. Andrews, 39 S.D. 477, 165 N.W. 9 (1917).
As to a definition of natural watercourses, see §§ 86 to 88.

3 Bradbury v. Vandalia Levee & Drainage Dist., 236 Ill. 36, 86 N.E. 163 (1908); Fenton & Thompson R. Co. v. Adams, 221 Ill. 201, 77 N.E. 531 (1906); Quinn v. Chicago, M. & St. P. Ry. Co., 23 S.D. 126, 120 N.W. 884 (1909).

4 Tide Water Oil Sales Corp. v. Shimelman, 114 Conn. 182, 158 A. 229, 81 A.L.R. 256 (1932).

5 Aldritt v. Fleischauer, 74 Neb. 66, 103 N.W. 1084 (1905); Chicago, R.I. & P.R. Co. v. Shaw, 63 Neb. 380, 88 N.W. 508 (1901).

6 Kroeger v. Twin Buttes R. Co., 13 Ariz. 348, 114 P. 553 (1911), aff'd, 14 Ariz. 269, 127 P. 735 (1912).

7 Sanguinetti v. Pock, 136 Cal. 466, 69 P. 98 (1902).

8 Arthur v. Glover, 82 Neb. 528, 118 N.W. 111 (1908).

9 Sheffet v. County of Los Angeles, 3 Cal. App. 3d 720, 84 Cal. Rptr. 11 (2d Dist. 1970).

10 Saelens v. Pollentier, 7 Ill. 2d 556, 131 N.E.2d 479 (1956).

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2. Drainage; Interference with Natural Flow

c. Remedies and Actions

§ 211. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1195 to 1211

Trial Strategy

Recovery Under Property Insurance for Loss Due to Surface Water, Sewer Backup, and Flood, 48 Am. Jur. Proof of Facts 3d 419

Cause of Action for Damage Caused by Diversion of or Change in Flow of Surface Water, 48 Causes of Action 2d 397

An action at law for damages will lie against one who wrongfully diverts or collects and discharges surface water on adjoining lands.[1]

An invasion of one's interest in the use and enjoyment of land resulting from another's interference with the flow of surface water may constitute a private nuisance.[2] In one state, liability for a private nuisance caused by the flow of surface waters from a landowner's property to that of an adjoining landowner depends on whether the landowner is making a reasonable use of his or her land.[3] When considering a private nuisance claim relating to the alteration of the flow of surface waters, the fact finder must balance the utility of the defendant's use of the land with the harm that results from the defendant's alteration of the flow of surface waters.[4] While a property owners' action for nuisance against adjacent property owners can be based on allegations of negligent conduct,[5] negligence is not a necessary ingredient of a cause of action growing out of nuisance.[6]

For purposes of a trespass claim, surface-water diversion may effect an intrusion onto land.[7]

Observation:

It has been said that a continuing trespass and a continuing nuisance are one and the same thing in a surface-water invasion case.[8]

In a proper case, equity will afford preventive relief by injunction against the wrongful discharge of waters[9] or obstruction of their natural flow.[10] Thus, if a property owner's construction of improvements unreasonably causes flooding or other damage to a neighboring property, a court may grant mandatory injunctive relief to abate or ameliorate the effects of that damage.[11] Similarly, when the owner of a servient estate does something to prevent the flow of the water, such as placing obstacles to drainage from the dominant through the servient estate, the remedy is a mandatory injunction ordering the owner of the servient estate to remove the obstacle.[12]

Where a private owner seeks to enjoin the diversion of surface water, the owner must generally show irreparable harm.[13] It is not necessary in an action to enjoin one from collecting and discharging surface waters in a volume upon the plaintiff's land, for the plaintiff to prove that actual injury has already occurred, as the remedy is preventive and may be had upon proof that the act complained of, unless restrained, will result in damage.[14] However, a showing of imminent harm may be necessary.[15] Even though an upper owner is wrongfully collecting and discharging surface water upon a lower proprietor by artificial means, relief by mandatory injunction, which depends upon invoking the equitable powers of the court, can be granted or withheld on reasonable and equitable conditions.[16]

Practice Tip:

A claim for injunction relief by dominant-estate owners seeking removal of dams from a creek on the servient estate owners' property is not barred by res judicata due to a previous injunction action as res judicata is not applicable to bar a claim for injunction in cases involving the natural servitude of drainage.[17]

CUMULATIVE SUPPLEMENT

Cases:

Monetary compensation would not afford adequate relief to northern landowners, as an element of the decision whether to grant their request for preliminary injunctive relief in action against southern landowner alleging that increased water drainage from southern landowner's property onto their property constituted nuisance; competing proposals presented by both landowners to remedy drainage problems were not equivalent in that southern landowner's proposal would not prevent increased drainage from penetrating farther into northern landowners' property. Hedlund v. River Bluff Estates, LLC, 2018 SD 20, 908 N.W.2d 766 (S.D. 2018).

Evidence supported finding, as prerequisite to granting servient landowners an injunction prohibiting dominant landowners from operating drainage pump and requiring removal of installed drain tile, that dominant landowners, by installing drainage system, changed natural flow characteristics of water draining from their property to servient landowners' property, thereby causing damage to farming land; prior to water pump's install, natural waterway running through servient landowners' property was typically wet in spring and then dry after year progressed, whereas after pump's install, servient landowners were unable to farm those areas because they were continually wet, and experts acknowledged that drainage system caused additional water to flow onto servient landowners' property. S.D. Codified Laws §§ 46A-10A-20, 46A-10A-70. Rumpza v. Zubke, 2017 SD 49, 900 N.W.2d 601 (S.D. 2017).

[END OF SUPPLEMENT]

Footnotes

1 Helphand v. Independent Telephone Co. of Omaha, 88 Neb. 542, 130 N.W. 111 (1911); Cashin v. City of New Rochelle, 256 N.Y. 190, 176 N.E. 138 (1931); Wiseman v. Tomrich Const. Co., 250 N.C. 521, 109 S.E.2d 248 (1959).

2 Vaughn v. Drennon, 202 S.W.3d 308 (Tex. App. Tyler 2006).
Interference with the flow of surface water is to be analyzed under nuisance. Angeles v. Larson, 249 S.W.3d 278 (Mo. Ct. App. E.D. 2008).
Adjoining landowners' claim that the neighbors interfered with the flow of surface water onto their property by installing a swimming pool which changed the contour of the land was one of nuisance rather than negligence per se or negligence, requiring a pattern jury instruction on nuisance. Angeles v. Larson, 249 S.W.3d 278 (Mo. Ct. App. E.D. 2008).

3 Trenz v. Town of Norwell, 68 Mass. App. Ct. 271, 861 N.E.2d 777 (2007).

4 Trenz v. Town of Norwell, 68 Mass. App. Ct. 271, 861 N.E.2d 777 (2007).

5 Vanderstow v. Acker, 55 A.D.3d 1374, 864 N.Y.S.2d 813 (4th Dep't 2008).

6 Green v. Eastland Homes, Inc., 284 Ga. App. 643, 644 S.E.2d 479 (2007).

7 Boylan v. 50 Eight LLC, 289 Mich. App. 709, 808 N.W.2d 277 (2010).

8 Bailey v. Annistown Road Baptist Church, Inc., 301 Ga. App. 677, 689 S.E.2d 62 (2009).

9 State of North Dakota v. State of Minnesota, 263 U.S. 365, 44 S. Ct. 138, 68 L. Ed. 342 (1923); E.J. Hollingsworth Co. v. Jardel Co., 40 Del. Ch. 196, 178 A.2d 307 (1962); Chappell v. Winslow, 258 N.C. 617, 129 S.E.2d 101 (1963); Rynestad v. Clemetson, 133 N.W.2d 559 (N.D. 1965).

10 Hoff v. Ehrlich, 511 P.2d 523 (Colo. App. 1973); Mallard v. Pye, 215 Ga. 645, 112 S.E.2d 620 (1960); Nichol v. Yocum, 173 Neb. 298, 113 N.W.2d 195 (1962).

11 Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 904 A.2d 725 (App. Div. 2006).

12 Richland Parish Police Jury v. Debnam, 92 So. 3d 487 (La. Ct. App. 2d Cir. 2012).

13 Bihuniak v. Roberta Corrigan Farm, 17 Neb. App. 177, 757 N.W.2d 725 (2008).
Alleged newly discovered evidence, regarding the origin of surface water entering a property, did not warrant a new trial or opening the judgment, after denial of the property owner's claim for an injunction against neighbors who had allegedly diverted water onto the owner's property, since the origin of the water was not relevant to whether the owner suffered present irreparable harm as an element of injunctive relief. Worth v. Korta, 132 Conn. App. 154, 31 A.3d 804 (2011), certification denied, 304 Conn. 905, 38 A.3d 1201 (2012).

14 Chappell v. Winslow, 258 N.C. 617, 129 S.E.2d 101 (1963).

15 Hurlburt v. DeRosa, 137 Conn. App. 463, 49 A.3d 249 (2012).

16 Buffalo Sewer Authority v. Town of Cheektowaga, 20 N.Y.2d 47, 281 N.Y.S.2d 326, 228 N.E.2d 386 (1967).

17 Richland Parish Police Jury v. Debnam, 92 So. 3d 487 (La. Ct. App. 2d Cir. 2012).

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Waters
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III. Particular Types of Waters or Water Bodies

D. Surface Waters

2. Drainage; Interference with Natural Flow

c. Remedies and Actions

§ 212. Measure and elements of damages

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1208, 1209

In actions for injuries to land by the obstruction, diversion, accumulation, or discharge of surface waters, the measure and elements of damages recoverable are the same as in other cases of injuries to real property and depend on whether the cause of the injury is of such a nature that it may be easily remedied, and thus give rise to a recovery of temporary damages, or whether the conditions which cause the injury may be said to be of a permanent nature, thus permitting a recovery of all the damages in one action and a recovery of what is called permanent damages.[1] According to some authorities, where the injury or nuisance complained of is permanent, the measure of recovery is the depreciation in the market value of the property, and the one recovery must suffice.[2] If, however, the injury to the property is temporary in its character, that is, such as can be remedied by abating the nuisance, or removing the cause of the injury, and readily repairing the property, the measure of damages is the reasonable cost of repairing the property and the depreciation in its rental value during the period sued for, if it is rented out or owned for renting, or, if it is occupied by the owner, in addition to the reasonable cost of repairs, the damage to its use, that is, the diminution, if any, in the value of the use of the property during the continuance of the nuisance or injury, covered by the period for which the action is brought.[3] In some cases, the rule has been stated broadly, without any distinction based upon the character of the injury as temporary or permanent, that the proper measure of damages for injury to upper land by obstruction of the flow of surface water therefrom by the proprietor of lower land is the difference in its market value before and immediately after the injury and not the cost of repairs.[4]

It has been stated that the amount of compensation for actual discomfort and annoyance suffered by an upper proprietor as the result of the obstruction of the flow of surface water by the lower proprietor rests in the sound discretion of the trial court, to be ascertained and adjudged after consideration of all the facts and circumstances.[5]

Under statute, damages may be available when a diversion or impoundment of surface water causes damage to the property of the plaintiff landowner.[6] In order to recover diminution in value damages for violation of a statutory provision prohibiting the improper diversion of surface water, a plaintiff must show: (1) the original value of the property before the damage occurred and (2) the value of the property after repairs are made.[7]

In various wrongful discharge of surface water cases, the evidence was sufficient to support an award of punitive damages,[8] to find the defendant's actions were malicious or egregious so as to warrant punitive damages[9] or, conversely, that the defendant's conduct did not amount to malice or gross negligence.[10]

Observation:

Even where a defendant did not act with conscious indifference in creating a problem that led to damage, such as a nuisance causing runoff of water and silt onto or from another's property, punitive damages may be justified if the defendant acted with such conscious indifference in failing to correct that problem.[11]

Footnotes

1 Board of Directors of St. Francis Levee Dist. v. Barton, 92 Ark. 406, 123 S.W. 382 (1909); Belveal v. H. B. C. Development Co., 279 S.W.2d 545 (Mo. Ct. App. 1955); McHenry v. City of Parkersburg, 66 W. Va. 533, 66 S.E. 750 (1909).
As to the measure and elements of damages for injuries by water, generally, see § 407.

2 Ewing v. City of Louisville, 140 Ky. 726, 131 S.W. 1016 (1910); Cashin v. City of New Rochelle, 256 N.Y. 190, 176 N.E. 138 (1931); Attoram Realty Corp. v. Town & Country Builders, Inc., 8 A.D.2d 936, 190 N.Y.S.2d 499 (2d Dep't 1959).

3 Ewing v. City of Louisville, 140 Ky. 726, 131 S.W. 1016 (1910); Frye v. Pennsylvania R. Co., 187 Pa. Super. 367, 144 A.2d 475 (1958).
The plaintiff may be awarded damages in the amount of the reasonable cost of placing his or her property in the condition in which it existed prior to injury where there is no showing as to the diminution in value or that the restoration cost would exceed such diminution in value. Grossman v. Jenad, Inc., 198 N.Y.S.2d 218 (Sup 1960).

4 Le Brun v. Richards, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336 (1930).

5 Le Brun v. Richards, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336 (1930).

6 Texas Woman's University v. The Methodist Hosp., 221 S.W.3d 267 (Tex. App. Houston 1st Dist. 2006).

7 Contreras v. Bennett, 361 S.W.3d 174 (Tex. App. El Paso 2011).

8 Day v. Gabriele, 101 Conn. App. 335, 921 A.2d 692 (2007); Wildcat Cliffs Builders, LLC v. Hagwood, 292 Ga. App. 244, 663 S.E.2d 818 (2008).

9 Downs v. Lyles, 41 So. 3d 86 (Ala. Civ. App. 2009); Marinaccio v. Town of Clarence, 90 A.D.3d 1599, 936 N.Y.S.2d 412 (4th Dep't 2011).

10 Mississippi Gulf Properties, LLC v. Eagle Mechanical, Inc., 98 So. 3d 1097 (Miss. Ct. App. 2012).

11 Wildcat Cliffs Builders, LLC v. Hagwood, 292 Ga. App. 244, 663 S.E.2d 818 (2008).

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III. Particular Types of Waters or Water Bodies

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2. Drainage; Interference with Natural Flow

c. Remedies and Actions

§ 213. Defenses

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1196, 1201

Forms

Am. Jur. Pleading and Practice Forms, Waters § 276 (Answer—Defense—Plaintiff's lack of right of drainage across defendant's land)

Am. Jur. Pleading and Practice Forms, Waters § 278 (Answer—Defense—Defendant merely facilitated natural drainage)

A lower proprietor who impedes the flow of surface water from the upper land is not relieved from liability for damages to the upper proprietor by the fact that the water would have reached either tract but for its original diversion by improvements made by a third person against whom the upper proprietor might have had relief.[1]

A contractor who installs a water main pursuant to a contract with a township in such a way as to allegedly negligently cause the pooling of water on a landowner's property is not liable to the landowner under the law of surface waters where the contractor neither owns nor controls a dominant estate from which surface water flows onto a landowner's property.[2] A property owner is not entitled to damages for an alleged continuing trespass caused by water from ponding on neighboring lots where the property owner's own actions in altering the topography of his or her property, rather than any actions of the owner of the neighboring lots or the engineering company that helped design the subdivision in which the properties were located, caused the ponding.[3]

There must be evidence that a landowner thought it had the right to let excessive water run onto private property to support an innocent trespasser defense to a trespass claim.[4]

Footnotes

1 Le Brun v. Richards, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336 (1930).

2 Boylan v. 50 Eight LLC, 289 Mich. App. 709, 808 N.W.2d 277 (2010).

3 Antoine v. Oxmoor Preservation/One, LLC, 2012 WL 2947896 (Ala. Civ. App. 2012).

4 Bailey v. Annistown Road Baptist Church, Inc., 301 Ga. App. 677, 689 S.E.2d 62 (2009).

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III. Particular Types of Waters or Water Bodies

D. Surface Waters

2. Drainage; Interference with Natural Flow

c. Remedies and Actions

§ 214. Parties; who may sue

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1203

A right of action for injury to the possession of real estate by surface water is in one who has possession under a verbal arrangement that the person is to have a home there and not in the owner.[1] A downhill tract owner did not have standing to bring an action against uphill tract owners for damages to property stemming from an improper diversion of the natural flow of surface water onto the downhill tract where a report done prior to the owner's purchase of the downhill tract indicated the drainage issue, and the owner did not obtain an assignment of claims possessed by the previous owner.[2]

If surface water is wrongfully turned upon the land of another, as the result of the joint acts of several parties, each may be sued for the entire amount of the resultant damage; but if the damage caused is the combined result of the acts of several, acting independently, each is liable in proportion to his or her contribution to the nuisance and not otherwise.[3]

Footnotes

1 Louisville & N.R. Co. v. Moore, 31 Ky. L. Rptr. 141, 101 S.W. 934 (Ky. 1907).

2 La Tierra de Simmons Familia, Ltd. v. Main Event Entertainment, LP, 2012 WL 753184 (Tex. App. Austin 2012), review denied, (Dec. 14, 2012).

3 San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200 (1920).

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§ 215. Pleading and proof

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1204, 1205

Trial Strategy

Proof of Landowner's Unreasonable Interference With Surface Water Drainage, 87 Am. Jur. Trials 423

In an action for damages for the flooding of land by surface water, caused by an excavation made by the defendant, the complaint need not allege that the work of excavation was negligently done; it is sufficient to show that it was wrongfully done and that the plaintiff was damaged in consequence thereof.[1] For a property owner's allegations to be sufficient to state a claim against an adjacent property owners for a private qualified nuisance, the complaint must show an invasion that was either (1) intentional and unreasonable or (2) unintentional but caused by negligent, reckless, or abnormally dangerous conduct.[2] A complaint did not sufficiently plead a cause of action alleging negligent interference with surface waters where it failed to present sufficient factual averments that the water impounded by the defendants' dams/reservoirs which was ultimately discharged during a rainstorm was surface water, i.e., the product of the accumulation of natural precipitation on the defendants' land or floodwaters that had detached from the river and spread over the land.[3]

A failure to plead a drainage easement as an affirmative defense in a neighboring property owner's trespass action constitutes a waiver thereof.[4]

In an action involving surface waters, the burden of proof ordinarily rests upon the plaintiff, as in other actions, to establish its case by competent evidence.[5] In an action for damages caused by flooding of a stream by surface waters, the burden is upon the plaintiff to establish that the flooding was caused by the addition of such surface water by the construction of artificial channels.[6] A landowner suing the owner of abutting property to recover for damage caused by the flow of surface water due to improvements has the burden to establish that the improvements on the abutting property caused the surface water to be diverted, that damages resulted, and either that artificial means were used to effect the diversion or that the improvements were not made in a good-faith effort to enhance the usefulness of the abutting property.[7]

The rule that an owner may, without being qualified as an expert on values, testify as to his or her opinion of the value of that which it owns does not extend to the giving of testimony by an upper proprietor as to the cost of repairs rendered necessary by the obstruction by a lower proprietor of the flow of surface water, especially where such testimony is merely a repetition of statements of other persons to the upper proprietor.[8]

When negligence is not a necessary ingredient of a cause of action growing out of nuisance, an owner of a lower parcel of land is not required to identify specific acts of negligence committed by the defendant before liability can attach in the nuisance action, which arises out of the alleged increased water runoff from a higher parcel of property.[9]

CUMULATIVE SUPPLEMENT

Cases:

Party seeking to recover from abutting property owner for flow of surface water must establish that improvements on abutting property owner's land caused surface water to be diverted, that damages resulted and either that artificial means were used to effect diversion or that improvements were not made in a good faith effort to enhance the usefulness of abutting owner's property. Wicks v. Kelly, 120 A.D.3d 977, 992 N.Y.S.2d 386 (4th Dep't 2014).

[END OF SUPPLEMENT]

Footnotes

1 Southern Ry. Co. v. Lewis, 165 Ala. 555, 51 So. 746 (1910).

2 Davis v. Widman, 184 Ohio App. 3d 705, 2009-Ohio-5430, 922 N.E.2d 272 (3d Dist. Seneca County 2009).

3 Stormes v. United Water New York, Inc., 84 A.D.3d 1352, 923 N.Y.S.2d 719 (2d Dep't 2011).

4 Marinaccio v. Town of Clarence, 90 A.D.3d 1599, 936 N.Y.S.2d 412 (4th Dep't 2011).

5 Minton v. Steakley, 466 S.W.2d 441 (Mo. Ct. App. 1971).

6 McCutchen v. Village of Peekskill, 167 Misc. 460, 3 N.Y.S.2d 277 (Sup 1938).
Where the drainage interfered with was through an artificial ditch constructed by a lower landowner, the upper landowner had the burden to show by clear and convincing evidence that the lower landowner's culvert so unreasonably interfered with the drainage of its land as to require a mandatory injunction. Minton v. Steakley, 466 S.W.2d 441 (Mo. Ct. App. 1971).

7 Hulse v. Simoes, 71 A.D.3d 1086, 899 N.Y.S.2d 268 (2d Dep't 2010).

8 Le Brun v. Richards, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336 (1930).

9 Green v. Eastland Homes, Inc., 284 Ga. App. 643, 644 S.E.2d 479 (2007).

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§ 216. Trial and judgment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1206, 1207, 1211

The question of negligence in the employment of means of defense against surface water is for the jury to determine upon the facts and circumstances in evidence in the case.[1] Whether the defendant continued or maintained a nuisance involving excessive flow of rainwater from its property onto the plaintiff's property is a question for the jury.[2] Whether a landowner's actions in altering the flow of surface water is a reasonable use of his or her property is a question of fact, to be determined in each case by weighing the gravity of the harm to the plaintiff against the utility of the defendant's conduct.[3] Likewise, whether an adjacent landowner made a reasonable effort to minimize resulting harm to a lower landowner when the adjacent landowner altered the natural drainage, which resulted in an increase in runoff onto the lower landowner's property, is for the jury in an action by the lower landowner seeking to recover for flood damage.[4]

A trial court has the authority to determine whether and how to require a party to abate the flow of water onto a landowner's property in a nuisance action.[5] However, in exercising its discretion in granting relief in surface-water run-off disputes, a court should not impose on the defendant any greater restriction or burden than is necessary to protect the plaintiff from the injury of which he or she complains.[6]

Sufficient evidence supported a jury's verdict that a property owner violated the reasonable use of surface-water rule.[7] In various cases, the evidence was legally sufficient to support the jury's finding that a party diverted the natural flow of surface waters[8] and that a neighbor was not negligent by allowing water to overflow onto other landowners' property.[9]

A party in a surface water action is not entitled to a jury instruction that is not warranted by the evidence at trial.[10] The failure of a trial court to give a pattern instruction on nuisance with respect to a property owner's claim against adjoining property owners for violation of the rule of reasonable use of surface water did not amount to plain error as the instruction actually given captured the fundamental element of reasonableness, which was the touchstone of the reasonable use rule.[11] A trial court's refusal of an adjacent landowner's jury instruction, offered to instruct the jury on a lower landowner's duty to mitigate flood damage, did not constitute an abuse of discretion where the trial court gave another mitigation instruction which more accurately stated the law.[12]

CUMULATIVE SUPPLEMENT

Cases:

At trial de novo in downstream landowner's appeal of decision of county board of commissioners finding that downstream landowner impermissibly altered intermittent watercourse, downstream landowner's failure to introduce hydrological evidence of subsurface showing how water moved underground in area of fields that were owned by downstream landowner and upstream landowner precluded downstream landowner from establishing that any blockage of watercourse did not result in water appearing in upstream landowner's basement or make upstream land unsuitable for calving or haying. Surat Farms, LLC v. Brule County Board of Commissioners, 2017 SD 52, 901 N.W.2d 365 (S.D. 2017).

Evidence was sufficient to support jury verdict in favor of neighbor on landowners' claims that neighbor's development and excavation of his adjoining land caused sediment runoff which damaged landowners' property, and thus new trial was not warranted; jury heard testimony that landowners' pond was located at the lowest point in the neighborhood and runoff from surrounding properties, in addition to neighbor's, flowed across their land into their pond, landowners did not present evidence establishing how much sediment accumulated in the pond as a result of neighbor's development of his property, and, while the jury was shown photographs and videos depicting a muddy pond, they were also presented with testimony and video of clear water with lily pads. Grimmett v. Smith, 792 S.E.2d 65 (W. Va. 2016).

[END OF SUPPLEMENT]

Footnotes

1 Snyder v. Platte Valley Public Power and Irrigation Dist., 144 Neb. 308, 13 N.W.2d 160, 160 A.L.R. 1154 (1944).

2 Bailey v. Annistown Road Baptist Church, Inc., 301 Ga. App. 677, 689 S.E.2d 62 (2009).

3 Klokkenga v. Carolan, 200 S.W.3d 144 (Mo. Ct. App. W.D. 2006).

4 Mississippi Gulf Properties, LLC v. Eagle Mechanical, Inc., 98 So. 3d 1097 (Miss. Ct. App. 2012).

5 Menzies v. Hall, 281 Ga. 223, 637 S.E.2d 415 (2006).

6 Menzies v. Hall, 281 Ga. 223, 637 S.E.2d 415 (2006).

7 Atkinson v. Corson, 289 S.W.3d 269 (Mo. Ct. App. W.D. 2009).

8 Royce Homes, L.P. v. Humphrey, 244 S.W.3d 570 (Tex. App. Beaumont 2008).

9 Stukes v. Bachmeyer, 249 S.W.3d 461 (Tex. App. Eastland 2007).

10 Bailey v. Annistown Road Baptist Church, Inc., 301 Ga. App. 677, 689 S.E.2d 62 (2009); Wietzke v. Chesapeake Conference Ass'n, 421 Md. 355, 26 A.3d 931 (2011).

11 Atkinson v. Corson, 289 S.W.3d 269 (Mo. Ct. App. W.D. 2009).

12 Mississippi Gulf Properties, LLC v. Eagle Mechanical, Inc., 98 So. 3d 1097 (Miss. Ct. App. 2012).

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